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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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HARRY N. BABCOCK
P. O. Box 6419
Cleveland, Ohio 44101

MICHAEL BOUDIN
STUART C. STOCK
888 Sixteenth St., N.W.
Washington, D.C. 20006

ANGELICA D. LLOYD
8 N. Jefferson St.
Roanoke, Va. 24042

CHARLES E. MECHEM
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

Attorneys for Petitioners

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Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petitioners, constituting the principal Eastern railroads in the United States,[1] request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Court of Appeals' decision, which is not yet officially reported, appears at Appendix B to this petition. It affirmed the decision of the Interstate Commerce Commission which is reported at 359 I.C.C. 639 and appears at Appendix C. The

[1] The names of petitioners are set forth in Appendix A to this petition.

Interstate Commerce Commission's decision modified and adopted the Administrative Law Judge's initial decision which is unreported but appears at Appendix D.

JURISDICTION

The judgment of the Court of Appeals, which was entered on December 20, 1979, appears at Appendix E. Mr. Justice Stewart extended the time for filing this petition for certiorari to and including May 19, 1980, by order entered March 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Railroads in the United States have for many years engaged both in common carrier transportation and in non-common carrier activities including private carriage transportation. In this case the Court of Appeals sustained an ICC order requiring the Eastern railroads to provide common carrier transportation for nuclear materials even though the Eastern railroads have never carried such materials except on a private carriage basis because of the special dangers involved. The questions presented are:

1. Did the Court of Appeals err in holding, contrary to the common law and decisions of other federal courts, that a railroad that acts as a common carrier with respect to some commodities thereby becomes a common carrier for entirely different commodities for which it has never held itself out to provide common carriage.

2. Did the Court of Appeals err in holding, contrary to the common law and decisions of other federal courts, that the Interstate Commerce Act *sub silentio* abandons the longstanding common law "holding out" test of common carriage.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act appear at Appendix F.

STATEMENT OF THE CASE

A. The Common Law Standard and the Interstate Commerce Act

Under common law, the hallmark of a common carrier is that it has undertaken to carry a particular commodity or class of commodities " 'for all people indifferently;' "[2] or, put another way, to be a common carrier "one must hold oneself out indiscriminately" as available to carry for "the clientele one is suited to serve."[3] Once a carrier offers common carrier service for a commodity, various obligations follow, including the basic obligation to furnish such transportation upon request and without discrimination. In the first instance, however, the status of common carrier, with its attendant obligations, is assumed only where the carrier makes such a public "holding out."[4]

Moreover, even if a carrier has chosen to hold itself out to the public as a common carrier of certain types of commodities, it does not at common law become a common carrier with regard to all other commodities. A carrier may hold itself out to the public to transport certain commodities and will be deemed

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[2] *Semon* v. *Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960); accord, *e.g.*, *The Home Insur. Co.* v. *Riddell*, 252 F.2d 1, 4 (5th Cir. 1958).

[3] See, *e.g.*, *National Ass'n of Regulatory Utility Comm'rs* v. *FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976); accord, *e.g.*, *Arrow Aviation, Inc.* v. *Moore*, 266 F.2d 488, 490 (8th Cir. 1959).

[4] See, *e.g.*, *Michigan Public Utilities Comm'n* v. *Duke*, 266 U.S. 570, 575, 577-78 (1925); *Frost & Frost Trucking* v. *Railroad Comm'n*, 271 U.S. 583, 592 (1926).

a common carrier as to those commodities. But, at the same time, it may choose to make individualized decisions as to whether and on what terms to carry other types of commodities.[5] Where a carrier follows the latter course, it is understood to be acting not as a common carrier but as a private carrier.[6] The controlling consideration in deciding a carrier's status with respect to a commodity is what the carrier *in fact* does.[7]

The Interstate Commerce Act ("the Act"), initially passed in 1887, "codified the common-law obligations of railroads as common carriers." *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 406 (1967). Nothing in the Act's language suggested that Congress contemplated any new or different definition of common carriage. On the contrary, references to "common carriers" appeared from the outset as predicates to application of the Act, on the clear assumption that everyone was familiar with the settled common law definition. See 24 Stat. 379-88 (1887).

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[5] For example, in *Railroad Co.* v. *Lockwood*, 84 U.S. (17 Wall.) 357, 377 (1873), this Court observed:

> "A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

See also, *e.g.*, *Liverpool & Great Western S.S. Co.* v. *Phenix Insur. Co.*, 129 U.S. 397, 440 (1889).

[6] See, *e.g.*, *National Ass'n of Regulatory Utility Comm'rs* v. *FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976); *Semon* v. *Royal Indemnity Co.*, *supra*, 279 F.2d at 739-40; *The Home Insur. Co.* v. *Riddell*, *supra*, 252 F.2d at 5. Private carriage is only one of many non-common carrier activities in which railroads engage (*e.g.*, warehousing, car manufacture).

[7] See, *e.g.*, *United States* v. *California*, 297 U.S. 175, 181 (1936); *Terminal Taxicab Co.* v. *Kutz*, 241 U.S. 252, 254 (1916).

Section 1(1)[8] makes the Act's rail carrier provisions applicable to "common carriers engaged in the [interstate and foreign] transportation of passengers or property . . . by railroad." The rail carrier portion of the Act does not contain any provisions concerning the regulation of railroads engaged in transportation as private rather than as common carriers.[9]

Where a railroad is engaged in transportation as a common carrier, the Act imposes various specific obligations upon it. Two such provisions are involved in this case. First, insofar as a railroad is acting as a "common carrier subject to" the Act, Section 1(4) of the Act[10] makes it the "duty" of such carrier to provide transportation "upon reasonable requests therefor." In this regard, Section 1(4) is merely "declaratory" of the obligation to which railroads were subject at common law when engaged in common carriage.[11]

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[8] 49 U.S.C. § 1(1), *now* 49 U.S.C. § 10501. In 1978, Congress reorganized and codified the provisions of the Interstate Commerce Act (92 Stat. 1337 (1978)) without "making substantive changes in the law." See, *e.g.*, H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 8(1978). Since this case was decided by the Commission under the provisions in the pre-1978 language (Pet. App. 1c-3c, 1d-21d) and since Congress has expressly declared that the codified provisions "may not be construed as making a substantive change in the laws replaced" (92 Stat. 1466), this petition will refer to and quote from the prior version of the Act, with cross references to the new code sections.

[9] Other parts of the Act, which were added after the rail carrier provisions were first enacted, do contain provisions for limited regulation of non-common carriage transportation by certain types of non-rail carriers. See, *e.g.*, Sections 309(a)(1), 909(f), 49 U.S.C. §309(a)(1), 909(f), *now in pertinent part* 49 U.S.C. §10921 (motor and water contract carriers).

[10] 49 U.S.C. § 1(4), *now in pertinent part* 49 U.S.C. § 11101.

[11] See *Johnson* v. *Chicago, M., St.P. & P. R.R.*, 400 F.2d 968, 971 (9th Cir. 1968); *Lucking* v. *Detroit & C. Nav. Co.*, 273 F. 577, 583 (E.D. Mich. 1921).

Second, Section 6(1)[12] requires railroads to file with the ICC and publish "all the rates, fares and charges for transportation" undertaken by them as "common carriers subject to" the Act. This remedial provision was designed to ensure that railroads provide common carriage service on non-discriminatory terms as required at common law.[13]

B. The Factual Background of this Case

Although the Eastern railroads historically have provided common carriage and published tariff rates for many commodities, they have never voluntarily done so for the commodities involved in this case: irradiated nuclear fuel assemblies ("spent fuel") and various types of radioactive waste.[14] Such radioactive materials are transported from nuclear electrical generating plants and from nuclear powered United States Navy vessels to reprocessing plants, waste storage facilities, and commercial burial sites. J.A. 3-4, 49, 76-77.[15] Spent fuel and high-level radioactive waste are shipped in specially designed rail casks, while low-level waste is shipped in either fifty-five gallon drums or fiberglass-coated boxes inside cargo containers. Pet. App. 4d.

Transportation of spent fuel and radioactive waste does not pose any danger of explosion but, as the ICC Adminis-

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[12] 49 U.S.C. § 6(1), *now* 49 U.S.C. § 10762.

[13] See, *e.g.*, *Kansas C. S. Ry.* v. *C.H. Albers Commission Co.*, 223 U.S. 573, 596-97 (1912); *Ephraim* v. *Safeway Trails Inc.*, 341 F.2d 815, 819 (2d Cir. 1965).

[14] Irradiated fuel assemblies are removed from nuclear reactors after being used to power such reactors. Radioactive wastes include residues generated in processing spent fuel and items such as tools, clothing, filters, wiping cloths and other trash incidentally contaminated in the operation of nuclear reactors. Pet. App. 4d.

[15] Reference to "J.A. " are to the Joint Appendix in the court below; references to "J.A. Ex. " are to the Joint Appendix Exhibits in the court below.

trative Law Judge in this case observed, "there is a serious danger of contamination." Pet. App. 4d. If, as a result of a train derailment or other similar accident, even a small amount of material escaped from a rail cask loaded with nuclear fuel, enormous losses of life and property could occur.[16] Because of the serious risks involved, the Eastern railroads have never held themselves out to the public as generally available to carry spent fuel or radioactive wastes. Instead they have accommodated the needs of shippers by providing such transportation only under special arrangements, outside the scope of their normal common carrier business. J.A. Ex. 415-16, 419-20, 565-66.

Accordingly, when the railroads operating in the Southern and Western parts of the country first published tariffs in 1962 for the common carriage of spent fuel and radioactive wastes, petitioners "flagged out" of the tariffs—that is, they specifically declined to join as parties to such tariffs.[17] J.A. Ex. 78-90, 91-93. As a result, those tariffs were by their terms inapplicable to the Eastern railroads. While the Southern and Western railroads have from time to time supplemented their radioactive waste tariffs, the Eastern railroads have consistently "flagged out" of those supplements and thus declined to hold themselves out as common carriers with respect to spent fuel and radioactive wastes. J.A. Ex. 61-69.

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[16] Evidence before the ICC in this case showed that the escape of only 0.1 percent of the nuclear material in a rail cask could cause hundreds of deaths and millions of dollars in damages. J.A. Ex. 442. The record also contains evidence indicating that in 1976 alone there were eight serious derailments of ordinary common carriage trains on the lines of just one of the 18 Eastern railroad petitioners. These derailments have resulted in explosions, extensive fires and even railroad cars plunging into a river. J.A. Ex. 396-401.

[17] Publication of tariffs for a commodity, of course, constitutes a holding out to the public with respect to the transportation of that commodity. The Eastern railroads "flagged out" from the transportation of radioactive wastes because they were not prepared to hold themselves out to the public generally as available to transport spent fuel and radioactive wastes.

Moreover, although the Eastern railroads have periodically carried spent fuel and radioactive wastes for the Federal Government since 1959, such carriage has been undertaken only pursuant to special contractual arrangements between the railroads and the Federal Government under Section 22 of the Act.[18] Such contracts expressly provide that the Eastern railroad petitioners "do not hold themselves out to transport" spent fuel or radioactive wastes. J.A. Ex. 583, 419-20.

Carriage of these highly dangerous materials only pursuant to special contractual arrangements enables the Eastern railroads, who generally operate in the most densely populated portion of our country, to minimize the risks involved in transporting each individual shipment. Under the contracts, special trains can be employed to carry only such nuclear materials; specially trained shipper personnel can assist in handling the materials; special train routings can be used to avoid potentially dangerous track and high traffic areas; and special arrangements can be made to minimize switching and other customary railroad handling that increases the risk of derailment or other accident.[19] J.A. Ex. 417-18, 558-61.

In sum, the Eastern railroads have consistently transported the nuclear materials at issue in private carriage, under special contractual arrangements, in an effort to move such materials in

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[18] 49 U.S.C. § 22, *now in pertinent part* 49 U.S.C. § 10721. On rare occasions, the Eastern railroads have also been asked to transport such materials for utilities and have done so pursuant to contract.

[19] Evidence was introduced before the ICC showing that transportation of spent fuel and radioactive wastes by special train service offers a number of advantages, including the likelihood of less damage in the event of an accident, the likelihood that no prolonged fires would occur since no flammable freight would be carried with the special shipment, less likelihood of a serious derailment because of decreased train length, less likelihood of switching mishaps because of less switching and no intermediate stops in transit, the likelihood of considerably shorter actual transit time, and the likelihood that clean-up operations would be easier and less time-consuming in the event of a major derailment. J.A. Ex. 714-16.

the most prudent manner possible considering where they operate. They have never published tariffs offering to carry spent fuel and radioactive wastes, they have never voluntarily transported such materials as part of their common carrier business, and they certainly have never held themselves out to the public as generally available to transport such materials.[20]

C. The ICC and Court of Appeals' Proceedings

In 1976, the Energy Research and Development Administration filed a complaint with the ICC asserting that the Eastern railroads' "flagout" from the tariffs for spent fuel and radioactive wastes violated various provisions of the Act, including Sections 1(4) and 6(1). ERDA's complaint requested that the Eastern railroads be ordered to file tariffs for transporting such materials. Subsequently, similar complaints were also filed by various private parties, primarily utilities, claiming to be shippers of or reprocessors of spent fuel or radioactive wastes or manufacturers of containers for such shipments. All these complaints were consolidated for administrative hearing.

The Eastern railroads argued before the ICC that their transportation of spent fuel and radioactive wastes plainly was not subject to the Act's common carrier provisions, since they had "flagged out" of the Southern and Western tariffs and had never held themselves out to the public generally as available to transport such materials. In the initial decision, the Administrative Law Judge held that the Eastern railroads were subject to the Act's common carrier provisions with respect to their transportation of the nuclear materials at issue, and the ALJ ordered them to publish tariffs for the transportation of such

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[20] Because of the order entered by the ICC in this case, the Eastern railroads filed tariffs for nuclear waste materials in 1979, but they did so only under compulsion and pending the outcome of this case. Moreover, the ICC has recently deemed unnecessary the Eastern railroads' tariffs which specified special train service for such materials and has held that the Eastern railroads must charge regular train service rates for the carriage of those materials. *Trainload Rates on Radioactive Materials, Eastern Railroads*, 362 I.C.C. 756 (1980).

materials. Pet. App. 17d-18d, 21d. Without disagreeing that the Eastern railroads had never held themselves out to the public with respect to the carriage of these nuclear materials, the ALJ simply dismissed the issue of a public holding out as being "of little consequence." Pet. App. 17d.

In the ALJ's view, the essential fact was that the Eastern railroads are common carriers of other commodities. The ALJ asserted that, as such, they are required by Sections 1(4) and 6(1) of the Act to furnish transportation to all shippers "upon reasonable request," including shippers of spent fuel and radioactive wastes that the Eastern railroads have never held themselves out as generally available to carry. Pet. App. 17d-19d. Framing the issue squarely, the ALJ held that the railroads "as common carriers are not free to pick and choose which commodities they will carry in common carrier service and which commodities they will transport as private carriers." Pet. App. 18d.

On appeal, Division 2 of the Commission affirmed the ALJ's initial decision ordering the Eastern railroads to cancel their "flagout" and to publish tariffs for the movement of spent fuel and radioactive wastes. Pet. App. 3c. In so doing, the Commission adopted the ALJ conclusions and findings with only minor changes. Pet. App. 3c.[21] The full Commission did not review the decision.

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[21] In its brief decision, Division 2 asserted that "[b]asically the same major issues" raised by the Eastern railroads were previously presented and decided adversely to petitioners in *Radioactive Materials, Missouri-K.-T. R.R*, 357 I.C.C. 458 (1977), and *Radioactive Materials, Special Train Service, Nationwide*, 359 I.C.C. 70 (1978). Pet. App. 2c. However, the railroads involved in both those cases, *unlike* the Eastern railroads, had previously published common carrier tariffs for radioactive waste materials and had thereby held themselves out to act as common carriers of such material. 357 I.C.C. at 459; 359 I.C.C. at 71.

The Court of Appeals for the Sixth Circuit affirmed Division 2's decision.[22] The court acknowledged that "at common law carriers could pick and choose the goods which they would transport in common carriage." Pet. App. 7b. Yet, although this Court has said that the Act was intended to "codify the common-law obligations of railroads as common carriers" (see p. 4, above), the lower court held that the Act has altered the common law. It ruled in substance that the Commission may require a railroad to act as a common carrier subject to Section 1(4) and 6(1) with respect to commodities, such as spent fuel and radioactive wastes, that the railroad has never held itself out to the public as generally available to carry. Pet. App. 7b-11b.

In addition, the lower court indicated that the Eastern railroads could be treated as common carriers of the nuclear materials at issue under the standard of the Act. The court did not contend—as it could not—that the Eastern railroads had ever held themselves out to the public to carry such materials.[23] Instead, it asserted that they should be treated as common carriers of spent fuel and radioactive wastes under the Act because of their "long history" of carrying such materials—always, of course, under special contractual arrangement—and the court's own view as to the "continuing national need for such carriage." Pet. App. 9b.

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[22] The Court of Appeals' jurisdiction was invoked under 28 U.S.C. §§ 2321 & 2342.

[23] Indeed, the Court of Appeals expressly rejected the ALJ's self-proclaimed "make weight" argument (Pet. App. 18d) that the Eastern railroads, by quoting rates under Section 22 of the Act for carriage of Government spent fuel and radioactive waste shipments (see p. 8, above), had somehow "render[ed] subsequent transport of the same commodities for private shippers subject to all of the Act's provision." Pet. App. 9b. The court thus recognized—as the railroads had contended before the Commission (Pet. App. 14d)—that transportation under Section 22 quotations "does not constitute a public holding out," since "[o]nly the Government may ship under such quotations."

REASONS FOR GRANTING THE WRIT

This case presents basic questions concerning the scope of ICC regulatory authority over railroads under the Interstate Commerce Act. It squarely poses the question whether the ICC can impose common carrier obligations on private carriage by railroads simply because the railroads are subject to such regulation when engaged in common carriage of other commodities. In addition, it poses the question whether the classic common law "holding out" test of common carriage has been supplanted in the Interstate Commerce Act and counterpart regulatory legislation affecting other carriers.

Such questions are manifestly important to the administration of a major regulatory statute. Moreover, the lower court's resolution of these questions conflicts with the presumption that Congress intended to adopt the common law concept of common carriage and with longstanding decisions of this Court, other federal courts, and the ICC holding or assuming that Congress did adopt the common law concept. The decision's displacement of the familiar common law standard could have a sweeping impact upon carriers and the regulatory processes to which they are subject.

I. The Decision Below, by Extending Common Carrier Obligations to Non-Common Carrier Activities, Misconstrues the Interstate Commerce Act and Conflicts with Decisions of this Court and Other Federal Courts.

The Commission and the court below believed that, because a railroad carries some commodities as a common carrier, it thereby becomes a common carrier with respect to other commodities that it has never held itself out to carry on a common carrier basis. This determination fundamentally misconstrues the Interstate Commerce Act and conflicts with settled decisions of this and other courts; it rests upon reasoning which cannot be sustained; and it is highly mischievous in its con-

sequences. Certiorari is plainly warranted to review this determination.

1. The lower court decision is clearly at odds with the common law concept of common carriage which permits a carrier to act in that capacity for some commodities and to maintain private carrier status (or no status at all) with respect to others. See pp. 3-4, above. The Interstate Commerce Act was enacted in 1887 to "federalize" common carrier obligations, but Congress itself framed the Act to apply only to "common carrier" transportation (see p. 5, above) and nowhere suggested in the statute that it meant to discard the familiar and well recognized common carriage concept as the test of whether a railroad's activities are subject to common carrier obligations.

It is well established that, where Congress uses familiar terms without elaboration, it must ordinarily be taken to give such terms their settled meaning.[24] Even more pointedly, this Court has said not long ago that the Act "codified the common-law obligations of railroads *as common carriers.*" *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry., supra,* 387 U.S. at 406 (emphasis added). There is no proof whatever that Congress meant to alter the common carrier concept used at common law or eliminate the opportunity for railroads to engage in other activities on a non-common carrier basis.[25]

On the contrary, both this Court and other federal courts have held that a railroad *may* engage in private carriage of particular commodities and that such carriage is not subject to the Act's common carrier provisions even though the railroad may act as a common carrier with respect to other commodities. Thus, in *Santa Fe, P. & P. Ry.* v. *Grant Brothers Construction Co.,* 228 U.S. 177 (1913), the Court ruled that where a railroad

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[24] *Standard Oil Co.* v. *United States,* 221 U.S. 1, 59 (1911). Accord, *e.g., Lorillard* v. *Pons,* 434 U.S. 575, 583 (1978); *Agosto* v. *INS,* 436 U.S. 748, 754 (1978).

[25] When Congress later chose to regulate to a limited extent non-common carrier transportation of other types of carriers—*e.g.*, "contract" carriage by motor carriers—it used precisely that term. See p. 5 n. 9, above.

transported under a special contractual arrangement materials and men performing work for it, the railroad was "not acting in the performance of its duty as a common carrier," and thus the special rate provisions of its contract did not constitute impermissible "departures from the published tariffs." *Id.* at 188.

The Court of Appeals for the Seventh Circuit similarly concluded in *Northern Fur Co.* v. *Minneapolis, St. P. & S. Ste. M. Ry.*, 224 F.2d 181, *cert. denied*, 350 U.S. 900 (1955), that a railroad was not engaged in common carriage—and therefore was not required under the Act's provisions to file a tariff with the Commission—when it provided transportation for furs consigned to an independent railway express agency. It was undisputed that the railroad was not acting as a common carrier in transporting the furs for the express company. See *id.* at 184-85. In such circumstances, the Seventh Circuit held, the railroad "was not required to file tariffs covering [such carriage]." *Id.* at 185.[26]

The ICC has also clearly recognized that the Act's common carrier provisions are not applicable when a railroad undertakes to transport commodities outside its capacity as a common carrier. For example, in *Emporium* v. *New York C.R.R.*, 214 I.C.C. 153 (1936), it held that various railroads had not violated Section 1 of the Act by refusing to carry and establish rates for silverware and goldware. The Commission observed that such commodities had "never been transported by [the railroads] in freight service" and that " '[n]o common carriers undertake to carry every species of property, in respect to which

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[26] The Sixth Circuit itself has previously recognized that a railroad acting "outside the performance of its legal duties" as a common carrier "may contract as a private carrier." *United States* v. *Louisville & N. R.R.*, 221 F.2d 698, 700 (1955). This fundamental principle that railroads may engage in private carriage outside the scope of common carrier obligations has also been recognized by other federal courts. See *Sasinowski* v. *Boston & M. R.R.*, 74 F.2d 628 (1st Cir. 1935); *Long* v. *Lehigh V. R.R.*, 130 F. 870 (2d Cir. 1904); *Chicago, M. & St.P. Ry.* v. *Wallace*, 66 F. 506 (7th Cir. 1895).

they have not held themselves out as common carriers.' " *Id.* at 153-54.[27]

2. Both the court below and the ICC had to acknowledge that previous court and agency decisions have held that railroads may engage in private carriage transportation that is not subject to the Act's common carrier provisions. Pet. App. 8b; Pet. App. 16d. However, the lower court dismissed these prior decisions with the assertion that "the activities which 'lie outside' a carrier's duties under the Act are limited" (Pet. App. 8b); and the ICC contended that "[e]xceptions" from common carrier obligations are to be allowed only when the particular commodities "are shown not to be suited for common carrier rail service . . . ." Pet. App. 16d.

In fact, neither this Court's *Santa Fe* decision nor the Seventh Circuit's *Northern Fur* decision nor the ICC's own *Emporium* decision supports these proferred distinctions. None of the decisions contains any suggestion that there are only "limited" transportation activities that fall outside the Act's common carrier provisions; nor do the decisions indicate that the Act's provisions were inapplicable simply because the commodity involved was not "suited" for common carrier rail service. Instead, in each case the essential point was that the railroad was *not* in fact offering or engaged in the particular type of transportation as a common carrier and that, for this reason, the Act's common carrier provisions did not apply.

The decisions below have virtually read the "common carrier" requirement out of the Act. Sections 1(4) and 6(1) are expressly applicable only to a "common carrier subject" to the rail carrier provisions, and Section 1(1) makes clear that the Act's rail carrier provisions apply only to "common carriers

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[27] Likewise, in *Transportation of Circuses and Show Outfits*, 299 I.C.C. 330 (1956), the Commission explicitly ruled that a railroad "is not required, as a common carrier," to perform the specialized services involved in transporting circuses and show outfits, and "is free to enter into private contracts concerning such services." *Id.* at 333.

engaged in the [interstate or foreign] transportation of passengers or property . . . ." Accordingly, the Act, like the common law on which it is based (see pp. 3-4, above), clearly recognizes that a carrier may engage in the private carriage of commodities.

It is a settled precept that all terms of a statute are to be given meaning, if at all possible.[28] Here, it is not only possible but mandatory to give the "common carrier" references meaning by treating them as defining the activities made subject to Sections 1(4) and 6(1). That is the plain meaning of the references, and they have been read in this fashion by the Court in *Santa Fe,* by the Seventh Circuit in *Northern Fur,* and by the Commission itself in prior cases. The Commission and the lower court have given no reason for ignoring the language of the statute or the prior precedents.

3. The potentially far-reaching consequences of the decision below are a further reason for granting certiorari. First, by extending common carrier obligations to activities not previously undertaken by the railroads as common carriers, the lower court has cut those obligations adrift from their common law moorings. If the lower court decision stands, no carrier can be sure which of its transportation activities will be subject to tariffing and other statutory obligations previously applied to rail common carriage. In fact, for Eastern railroads engaged in transportation outside as well as within the Sixth Circuit, there is a continuing possibility that other courts will adhere to the traditional tests, and the reach of the Act will depend on the court in which review is sought.

Second, this Court has previously made clear that common carrier obligations may not constitutionally be imposed on those engaged in private carriage.[29] Indeed, the Court has

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[28] See, e.g., *United States* v. *Menasche,* 348 U.S. 528, 538-39 (1955); *Montclair* v. *Ramsdell,* 107 U.S. 147, 152 (1882).

[29] See, *e.g., Frost & Frost Trucking Co.* v. *Railroad Comm'n, supra,* 271 U.S. at 592; *Michigan Public Utilities Comm'n* v. *Duke, supra,* 266 U.S. at 577-78.

observed that even if a carrier has "devoted" its "property . . . to a public use on certain terms," this fact "does not justify" requiring the carrier to devote its property "to other public purposes, or to the same use on other terms . . . ." *Northern P. Ry.* v. *North Dakota,* 236 U.S. 585, 595 (1915).[30] As a result, there is considerable basis for questioning whether—as the court below and the ICC have effectively concluded—the Eastern railroads can constitutionally be subjected to common carrier requirements without regard to whether they are engaged in common or private carriage.[31] Given the susceptibility of the Act to a contrary construction (see pp. 15-16, above), the Commission should have construed the Act so as to avoid such constitutional issues. *E.g., Texas* v. *Eastern T. R.R.,* 258 U.S. 204, 217 (1922). It failed to do so, however, and the serious constitutional implications of the ICC's construction further underscore the need for plenary review by this Court. Cf. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

Third, the implications of the construction adopted by the ICC and the lower court in this case are particularly serious since the Interstate Commerce Act is the model on which other major regulatory statutes have been framed. *E.g.,* Communications Act of 1934, 47 U.S.C. § 151, *et seq.*[32] Consequently, this case clearly presents the very sort of "important question of regulatory authority" that this Court normally entertains. See *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 161

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[30] By way of illustration, this Court in *North Dakota* added that "[i]f [a carrier] has held itself out as a carrier of passengers only, it cannot be compelled to carry freight." 236 U.S. at 595.

[31] Compare *Smith* v. *Cahoon,* 283 U.S. 553, 563 (1931). (Florida regulatory statute putting "[a]ll carriers . . . , whether public or private, . . . upon precisely the same footing" held to be "manifestly beyond the power of the State").

[32] See, *e.g.,* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934); *American Broadcasting Companies* v. *FCC,* No. 78-1968 (D.C. Cir., filed April 28, 1980) (Slip op. at 6).

(1968).[33] Where the decision below involves a basic and far-reaching regulatory concept such as common carriage, the need for plenary review is especially strong.

II. The Decision Below, in Conflict With Settled Precedent, Disregards the Long Established "Holding Out" Test of Common Carriage.

The lower court's decision suggests that the Eastern railroads are also subject to common carrier obligations for radioactive materials because they may in fact be common carriers of such materials. Pet. App. 9b-11b. This determination results from the court's disregard of the long-accepted "holding out" test of common carriage and its resort instead to novel standards that literally turn the test of common carriage on its head. Certiorari is required to correct this fundamental legal error and to reaffirm the settled understanding and expectation of what constitutes common carriage under the Act.

1. At the time of the Act's passage in 1887, the test of common carriage was well established. As this Court itself recognized, the issue was whether the carrier had "ever held itself out as a common carrier" of the relevant goods or commodities. *The Express Cases,* 117 U.S. 1, 21 (1886). See also p. 3, above.

In framing the Act against this settled common law background, Congress simply specified that "the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property . . . by railroad . . . ." 24 Stat. 379 (1887). Since it was adopting an established

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[33] In a long line of cases, this Court has recognized its responsibility for delineating the scope of regulatory provisions contained in various federal statutes, including the Interstate Commerce Act. See, *e.g., County of Marin* v. *United States,* 356 U.S. 412 (1958); *Union Stock Yard & Transit Co.* v. *United States,* 308 U.S. 213 (1939). See also, *e.g., Chemehuevi Tribe of Indians* v. *FPC,* 420 U.S. 395 (1975) (Federal Power Act); *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954) (Natural Gas Act).

standard, Congress saw no need to provide any legislative definition as to when a railroad "engaged in the transportation of passengers or property" is acting *as a common carrier.* The original Act gave no evidence that Congress intended to alter the common law test, nor has Congress in the following 90 years ever expressed any intention to alter the "common carrier" standard originally adopted.

Decisions following passage of the Act by this Court, the lower federal courts, and the Commission confirm that the settled common law "holding out" test controls in statutes that do not explicitly alter the test. For example, in deciding that a towboat operator was within the scope of a state statute regulating all such boats operated as common carriers " 'for public use,' " this Court applied the common law test of whether the operator had "held itself out as a common carrier in that line of business." *Washington ex rel. Stimson Lumber Co.* v. *Kuykendall,* 275 U.S. 207, 210, 212 (1927).

Similarly, in determining whether certain types of communication carriers were "common carrier[s] for hire" within the meaning of the Communications Act of 1934, the District of Columbia Circuit in *National Association of Regulatory Utility Commissioners* v. *FCC, supra,* 525 F.2d at 640, expressly deemed "recourse to the common law of carriers" to be required.[34] Upon such recourse, it found that the "essential" characteristic of the "common carrier concept" to be "that the carrier 'undertakes to carry for all people indifferently . . . ,' "

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[34] The common carrier provisions of the Communications Act were modeled on the Interstate Commerce Act (see p. 17 n. 32, above) and are therefore normally construed *in pari materia.* See, *e.g., American Broadcasting Companies* v. *FCC,* No. 78-1968 (D.C. Cir., filed April 28, 1980) (Slip op. at 6-9); cf. *United States Navigation Co.* v. *Cunard S.S. Co.,* 284 U.S. 474, 480-81 (1932).

that is, "hold[s] [it]self out indiscriminately to the clientele [it] is suited to serve." *Id.* at 641 & 642.[35]

Prior to this case, the ICC itself reiterated, for many years and in numerous cases, the common law test "whether there is a bona fide holding out coupled with an ability to carry for hire."[36] As recently as 1973, the Commission stated in *Bush Universal, supra,* 342 I.C.C. at 564, that "the fundamental test for determining whether a party is a common carrier is whether there has been a 'holding out' to the public as a common carrier." This longstanding ICC interpretation cannot be brushed aside by the ALJ's bald assertion in this case that it is "of little consequence" whether the Eastern railroads have ever held themselves out as common carriers of spent fuel and radioactive wastes. Pet. App. 17d. The agency's longstanding and consistent interpretation clearly outweighs "its more recent *ad hoc* contention as to how the statute should be construed. . . ."[37]

These decisions, of course, reflect application of the basic principle that "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co.* v. *United States,* 221 U.S. 1, 59 (1911). This principle

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[35] Accord, *e.g., American Tel. & Tel. Co.* v. *FCC,* 572 F.2d 17, 24 (2d Cir.), *cert. denied,* 439 U.S. 875 (1978); *National Ass'n of Regulatory Utility Comm'rs* v. *FCC, supra,* 533 F.2d at 608-09; *Aho* v. *Erie Mining Co.,* 466 F.2d 539, 540 (8th Cir. 1972); *Kelly* v. *General Electric Co.,* 110 F. Supp. 4, 6 (E.D. Pa.), *aff'd per curiam,* 204 F.2d 692 (3d Cir.), *cert. denied,* 346 U.S. 886 (1953).

[36] *Atchison, T.&S.F. Ry.* v. *Kansas City Stock Yards Co.,* 33 I.C.C. 92, 100 (1915); *Detroit Edison Co. Terminal Allowance,* 209 I.C.C. 55, 58 (1935); *Bell Coal & Nav. Co. Application,* 223 I.C.C. 433, 435 (1937); *State of Vermont and Vermont Ry. Application and Operation,* 320 I.C.C. 609, 613-14 (1964); *Status of Bush Universal, Inc.,* 342 I.C.C. 550, 554 (1973).

[37] *United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396 (1956).

plainly determines the true test of common carriage for purposes of the Act.[38] Under this principle, it is apparent that the court below was not justified in disregarding the established common law test of a "holding out" to the public in applying the Act to this case.

Like the ALJ, the lower court in this case consciously rejected the common law "holding out" standard. It declared that the existence of the railroads' "common-carrier duties in the carriage of nuclear materials" were "not dependent" upon the railroads' "supposedly conscious refusal to 'hold themselves out' for carriage of nuclear materials." Pet. App. 10b. The court agreed that the "holding out" test may have been one of the "earmarks of common carriers at common law," but it asserted that "there has developed a new 'common' law of transportation under which the public duty of railroads has been broadened beyond that extant under the common law of carriers." Pet. App. 10b-11b.

The court's opinion, however, cites no authority in this or any other federal court even suggesting, much less holding, that the established common law "holding out" test has been superseded or abandoned.[39] The best that can be said for the lower court's assertion is that it confuses the question whether additional statutory obligations have been placed on railroads

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[38] The ICC itself recognized as much long ago in *Manufacturers Railway Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 21 I.C.C. 304, 312 (1911), where it observed: "The act to regulate commerce, limiting its application as it does to common carriers, was passed in full view and recognition of the common law under which the attitude and actions of the person, whether natural or artificial, determines whether or not he or it is in law a common carrier."

[39] In connection with its discussion of this "new 'common' law," the lower court refers to three cases, *none* of which contains any suggestion that the common law test of common carriage has been altered in the Act. See *Brotherhood of Ry. Clerks* v. *Florida E. C. Ry.*, 384 U.S. 238 (1966); *Cincinnati N.O.&T.P. Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971); *Republic Carloading & Distributing Co.* v. *Missouri P.R.R.*, 302 F.2d 381 (8th Cir. 1962).

when acting in a common carrier capacity with the quite different question of the standard for determining *whether* the railroads are acting in a common carrier capacity. Congress has indeed "broadened" the "public duty of railroads" insofar as they act as common carriers, but it has never altered the test of what constitutes common carrier activity.[40]

In short, contrary to the lower court's claim, the basic test of common carriage has remained unchanged since the Act was first passed. A public holding out was the test at common law; it was the test that Congress in 1887 unquestionably expected to govern the Act's application; it is the test that has regularly been employed by the agency responsible for administering the Act; and it continues to be the test under the Act today.

2. Having abandoned the common law test of a "public holding out," the lower court asserted that two factors serve to move "[the Eastern railroads'] transport of nuclear materials from the realm of 'accommodation or special arrangement' " to the realm of common carriage. Pet. App. 9b-10b. One factor was "the long history of the [Eastern railroads'] carriage of nuclear materials"; the other was the court's own view as to "the continuing national need for such carriage." Pet. App. 9b. Both factors represent a radical and unsustainable recasting of the test of common carriage.

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[40] By explicit changes in the Act, Congress has modified or extended the obligations of railroads acting as common carriers. For example, in the Esch Car Service Act of 1917, 40 Stat. 101, it altered their responsibilities with respect to car service. More recently, Congress provided in the "4-R" Act of 1976, that maximum rate regulation would no longer apply to commodities where the railroads lacked market dominance. 90 Stat. 35, *codified in* 49 U.S.C. § 10709. Within this context, Congress' repeated modification and re-enactment of the Act, without ever modifying the common carrier "holding out" standard, clearly indicates that it did not intend that standard to be altered. Cf., *e.g., Corn Products Refining Co.* v. *Commissioner,* 350 U.S. 46, 53 (1955).

In referring to the Eastern railroads' "long history" of carrying nuclear materials, the court below did not claim—as it could not—that such carriage involved any transportation of spent fuel and radioactive wastes under tariff or otherwise reflected any public holding out. It is undisputed that the Eastern railroads' "long history" involves transportation of such materials only under special contractual arrangements negotiated with the Government and certain private shippers (see p. 8, above), in other words, in private carriage. Insofar as the court below now seeks to treat the Eastern railroads as *common* carriers based on this history of *private* carriage, it has simply eliminated all distinction between private and common carriers. Not only is there no authority for such action, but it also raises serious constitutional questions. See p. 17, above.

In relying upon the purported "continuing national need for such carriage," the lower court has made clear that, in its view, it is the "public needs" that ultimately are the determinative test of common carriage. Pet. App. 11b.[41] In substance, the court has declared that common carrier status may be imposed simply by a judicial—or an administrative—determination that the public interest requires a carrier to act as a common carrier, whether or not it has in fact held itself out as such. But, as this Court has repeatedly made clear, a carrier's status is dependent on only one thing—"*what it does.*" *United States* v. *California*, 297 U.S. 175, 181 (1936) (emphasis added); accord, *e.g.*, *Terminal Taxicab Co.* v. *Kutz*, *supra*, 241 U.S. at 253-54. "[A]ssertion[s]" concerning "the public interest" cannot justify compelling a carrier to engage in common carriage when it has not chosen to do so. See *Northern P. Ry.* v. *North Dakota*, *supra*, 236 U.S. at 595.

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[41] Even if it were the proper standard—which it is not—a "public needs" test would not dictate common carrier status in this case. Private status facilitates use of special trains and other requirements to ensure greater protection for the public and the railroads, (see p. 8, above), but it does not prevent such shipments from moving by railroad.

3. The assertion that the Commission or the court can expand common carrier status at will, based on the court or agency's own notion of what will serve the public interest, is truly bizarre. It would make the *jurisdictional* outer boundary of agency authority expandable at the whim of the agency. The lower court's construction thus usurps the very core of Congress' authority.[42]

Moreover, by substituting an amorphous "public needs" test for the objective and factual "holding out" standard of the common law, the decision below injects extreme uncertainty into the regulatory status of business activities long outside the scope of common carrier regulation. Indeed, under the lower court's approach long established activities, like private carriage, could suddenly be subjected to common carrier obligations based on an administrative preference. This is an approach that makes no sense under any standard.

Ultimately, the proper test of common carriage poses a question whose significance extends far beyond the Interstate Commerce Act. Congress has drawn a substantial number of federal statutes so that their application depends, in whole or in part, on whether a carrier is acting as a "common carrier," without providing any definition of the term in such statutes.[43] In the past, the courts have regularly applied such statutes in accordance with the common law definition of common car-

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[42] The question of agency expansion is, of course, quite different from the question whether an agency has explicit or implicit authority to waive or diminish common carrier obligations which would otherwise apply. See pp. 15-16, above.

[43] See, *e.g.*, Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ("common carrier by railroad"); Shipping Act, 46 U.S.C. § 801 *et seq.* ("common carrier by water"); Communications Act, 47 U.S.C. §§ 201-23 ("common carrier . . . by wire or radio"); Safety Appliance Act, 45 U.S.C. § 1 *et seq.* ("common carrier . . . by railroad").

riage.[44] The decision below suggests, however, that the common law rules are not determinative and that private carriage may be deemed subject to such statutes based not upon what they have done but upon the view of some agency or court as to appropriate public policy in any particular set of circumstances.

If such an unprecedented approach to questions of carriers' status under federal regulatory statutes is allowed to stand, the result may be both to disrupt seriously the expectations of those already engaged in various forms of carriage and to discourage others from entering such fields. Consequently, the decision below presents precisely the type of question of "public importance" that warrants plenary review by this Court. Cf. *Lau* v. *Nichols*, 414 U.S. 563, 565 (1974).

CONCLUSION

For the reasons stated, certiorari should be granted and the case set for plenary review by this Court.

Respectfully submitted,

HARRY N. BABCOCK
P. O. Box 6419
Cleveland, Ohio 44101

MICHAEL BOUDIN
STUART C. STOCK
888 Sixteenth St., N.W.
Washington, D.C. 20006

ANGELICA D. LLOYD
8 N. Jefferson St.
Roanoke, Va. 24042

CHARLES E. MECHEM
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

Attorneys for Petitioners

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[44] See, *e.g.*, *National Ass'n of Regulatory Utility Comm'rs* v. *FCC*, *supra*, 525 F.2d at 640-41; *Aho* v. *Erie Mining Co.*, *supra*, 466 F.2d at 540; *Ciaccio* v. *New Orleans P.B. R.R.*, 285 F. Supp. 373, 375 (E.D. La. 1968).

APPENDIX A

PETITIONERS

The Akron, Canton & Youngstown Railroad Company

The Baltimore and Ohio Railroad Company

Bangor and Aroostook Railroad Company

Bessemer and Lake Erie Railroad Company

Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees

Central Vermont Railway, Inc.

The Chesapeake and Ohio Railway Company

Consolidated Rail Corporation

Delaware and Hudson Railway Company

The Detroit and Toledo Shore Line Railroad Company

Detroit, Toledo and Ironton Railroad Company

Grand Trunk Railway System

The Long Island Railroad Company

Maine Central Railroad Company

Norfolk and Western Railway Company

The Pittsburgh and Lake Erie Railroad Company

Richmond, Fredericksburg and Potomac Railroad Company

Western Maryland Railway Company

APPENDIX B

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 78-3425

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.
Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION, et al.
Respondents,

and

GPU SERVICE CORPORATION, et al.
Intervenors.

ON PETITION for review from the Interstate Commerce Commission.

Decided and Filed December 20, 1979

Before: CELEBREZZE, Circuit Judge, and PHILLIPS and PECK, Senior Circuit Judges.

PECK, Senior Circuit Judge. The issue in this case is simply whether the Interstate Commerce Commission ("Commission" or "ICC") has the authority to order railroads to carry spent nuclear fuel and low-level reactor wastes at rates prescribed by the Commission. Petitioners are twenty-two eastern railroad companies ("the railroads") which seek relief from the Commission's order compelling them to cancel their abstention, or "flagout," from publication of tariffs for the carriage of nuclear

materials. The Commission's order was the culmination of proceedings begun in 1976 when five separate complaints were filed with the Commission against the railroads. The complainants, the Energy Research and Development Administration and numerous eastern utilities companies, alleged that the railroads' continuing refusal to publish rates for the carriage of nuclear materials was in violation of the railroads' statutory duties under the Interstate Commerce Act. Following administrative hearings and findings of fact, the Commission ordered the railroads to "publish reasonable and otherwise lawful tariff provisions covering the transportation of irradiated fuel elements (spent fuel) and radioactive waste." The railroads, by their petition to this Court, seek judicial review of this final order under 28 U.S.C. §§ 2321 and 2342. Respondents to the railroads' petition are the United States and the Commission; all but two of the original complainants have participated in the proceedings before this Court as intervenors.

I. COMMISSION'S STATUTORY POWER

The railroads do not deny that the Commission has subject-matter jurisdiction of cases involving the duty of carriers subject to the Act to provide transportation upon reasonable request therefor. Rather, they rely upon *United States* v. *Pennsylvania R.R.*, 242 U.S. 208 (1916), in arguing that the Commission lacks any statutory power under former 49 U.S.C. § 1(4) (1976)[1] to order carriers to provide such transportation. But the Commission has ordered rate publication, not carriage of goods; it has not exercised any power delegated solely by

[1] Section 1(4) provided that "[i]t shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefore. . . ." On October 17, 1978, the Interstate Commerce Act was recodified without substantive change. Substantially identical language to that of § 1(4) is now to be found in 49 U.S.C.A. § 11101 (1979 Special Supp.). All subsequent references are to the current codification of the Act.

§ 1(4) of the Act. The Commission's authority for its order must therefore be sought in the entire legislative ratemaking scheme for rail carriage.

Since, however, the petitioners see the publication of rates and tariffs as equivalent to a general offer to carry the goods included in the published rate classification, they view the Commission's order as, in effect, an order to carry nuclear materials. It is not disputed that the petitioners have in fact carried these materials as carriers for hire; the effect of the Commission's order would be to bring this carriage within the Commission's ratemaking purview. Under this statutory ratemaking scheme, the rates proposed by the railroads themselves would be reviewed by the Commission to see if they were reasonable and lawful. 49 U.S.C.A. §§ 10702, 10707 (1979 Supp.).

In light of the petitioners' argument that the Commission's order was grounded on a statutory provision under which only courts have injunctive powers, and in view of the doubt which has recently arisen regarding the Commission's power to order carriers to provide transportation,[2] we feel some clarifying comment is called for. Such comment must begin with the *Pennsylvania Railroad* case, *supra*, in which the Supreme Court held that the Commission could not order a railroad to augment its supply of tank cars in order to meet an increasing demand by shippers for tank-car services. Since there was no question in the case of discrimination by the railroad in the allocation of the tank cars which it did possess, the Court ruled that the Commission was without statutory authority to order the railroad to acquire more equipment in order to furnish greater services.

The *Pennsylvania Railroad* case is now questionable precedent. The Court's specific ruling was overturned by Congress

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[2] *See, e.g.*, Winnebago Farmers Elevator Co. v. Chicago & N.W. Transp. Co., ____ I.C.C. ____, F.D. No. 28412 (March 29, 1978).

only one year after judgment was rendered. The Esch Act of May 29, 1917, 49 U.S.C. § 1(10) *et seq.* (1976), 40 Stat. 101, empowered the Commission to regulate the supply of rail cars. *See* H.R. Rep. No. 456, 66th Cong., 1st Sess. 17 (1919). Nevertheless, the Commission's own decisions have not limited the *Pennsylvania* case to its facts, but have interpreted it to mean that the Commerce Act gave the Commission no enforcement power under § 1(4). *Cancellation of C.R.I. & P. & Soo Line Rates—Livestock*, 340 I.C.C. 463 (1972); *Duralite, Inc.* v. *Erie Lackawanna Ry.*, 229 I.C.C. 312 (1971). The effects of such an interpretation of the *Pennsylvania* case were lessened, however, by the Commission's development of the "simultaneous involvement" doctrine, under which the Commission has ancillary jurisdiction of cases involving failure to provide service whenever other sections of the Act are "simultaneously involved." *Soo Line Rates, supra.* Recently the Commission has overruled its earlier holdings and ruled that the *Pennsylvania* case is no longer binding precedent. *Winnebago Farmers Elevator Co.* v. *Chicago & N.W. Transp. Co.*, ____ I.C.C. ____, F.D. No. 28412 (March 29, 1978). We need not go so far.

We stress again that the petitioners challenge the Commission's power to issue an order under former § 1(4) of the Act, not the Commission's subject-matter jurisdiction. Apart from the beleaguered *Pennsylvania* case, they rely in this challenge on *ICC* v. *United States ex rel. Los Angeles*, 280 U.S. 52 (1929), in which the Supreme Court held that the Commission did not have the power, under a section of the Act requiring carriers to provide "reasonable facilities," to order railroads to construct a terminal building. The Court found particular significance in the lack of an express statutory grant of such power.

Neither of the cases relied on by petitioners dealt with the Commission's ratemaking power—the power on which its

presently challenged order must be based. Review of the Act shows the power of the Commission in ratemaking is extensive; the Act provides that:

> (a)(1) When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, [*sic*] does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule or practice to be followed. *The Commission may order the carrier to stop the violation.*

49 U.S.C.A. § 10704 (1979 Supp.) (emphasis added).

Exclusion of a commodity from a carrier's published tariffs, as under the petitioners' flagout, is clearly a "classification" of that commodity within the meaning of that term under the Act. *See Director General of Railroads* v. *Viscose*, 254 U.S. 498 (1921). We therefore hold that the Commission's order that the railroads cancel their "flagout" was within the powers granted the Commission under the Act.

The provisions of the Act offer little support for the railroads' contention that, in their capacity as "private," contract haulers of spent fuel and reactor wastes, they are not subject to the ratemaking jurisdiction of the Commission. First, the Commission has general jurisdiction over interstate transportation by railroad. 49 U.S.C.A. § 10501(a)(1)(A) (1979 Supp.). Second, a carrier subject to the Commission's jurisdiction must publish rates for the transportation it provides. *Id.* § 10702(a)(1). No carrier providing transportation subject to the Commission's jurisdiction may do so unless a rate for the transportation or service is contained in a current tariff. *Id.* § 10761(a).

The Supreme Court has given full recognition to the primary jurisdiction of the Commission both in ratemaking,

Arrow Transp. Co. v. *Southern Ry.*, 372 U.S. 658 (1963); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and in the classification of goods for tariff purposes. *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956). The uniformity of rates and expertise in ratemaking sought by this grant of primary jurisdiction would be thwarted if it were held that only a court could order the publication of rates and tariffs for transportation which a carrier had already been providing.

We can only conclude that the petitioners were, in their carriage of nuclear materials, within the Commission's ratemaking jurisdiction. When a Commission order for publication of rates is directed at carriers already extensively engaged in the carriage to be regulated, such an order is simply not analogous to the orders to provide additional services which were struck down by the Supreme Court in the *Pennsylvania* case and *ICC ex rel. Los Angeles, supra.* The present case, unlike those two, may only correctly be seen as a ratemaking case, in which the Commission must and does have extensive powers.

II. COMMON CARRIERS

Analysis of the railroads' statutory obligations has been considerably hampered by the petitioners' attempts to encrust common-law concepts onto the Act's straightforward provisions. While it is obvious that the Act codified the common-law obligations of railroads as common carriers, *American Trucking Ass'n* v. *Atchison, T.&S.F. Ry.*, 387 U.S. 397 (1967), this does not mean that the Act created no purely statutory obligations of rail carriers. We are fully aware that "[t]here is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act." *Kansas City So. Ry.* v. *United States*, 282 U.S. 760, 764 (1931) (citations omitted). Unlike the counsel for the railroads, however, we have read the next sentence in this last-cited

opinion: "But a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation." *Id.* It may be true that only carriers who "held themselves out to the public" were common carriers at common law; but this does not override the clarified Commerce Act's definition of common carrier as including railroads.

The railroads do not argue that they are not common carriers under the Act; they assert only that they are not common carriers "as to" spent fuel and reactor wastes, because they have never published tariffs and rates for the carriage of these commodities. Thus, by the railroads' reasoning, while they may widely carry spent fuel and low-level wastes pursuant to individual contracts with numerous shippers, they would not be common carriers with statutory obligations in this carriage, so long as the contracts of carriage stated that they are not to be read as a "holding out to the public" of the railroads as common carriers of nuclear materials.

It is true that at common law carriers could pick and choose the goods which they would transport in common carriage; but even at common law, railroad companies, "whose property and facilities are affected with a public interest, [were] ordinarily held to be common carriers of goods delivered to them for transportation. . . ." 13 C.J.S. *Carriers* § 6. In many jurisdictions railroads are declared by statute, as they are presently under the Interstate Commerce Act, to be common carriers. 13 Am. Jur. 2d *Carriers* § 11. The Act's declaration of the common-carrier status of railroads is not an unjust one, in view of the governmental largess which railroads have received,[3] and in view of the unique importance to commerce of rail transportation.

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[3] Petitioner Rock Island & Pacific R.R. had, for example, prior to these proceedings, gotten a loan from the Federal Government of approximately $17 million. Congress has appropriated over $2 billion for loans to petitioner Conrail.

There are exceptions to the general statutory common-carrier obligations of railroads; but the activities which "lie outside" a carrier's duties under the Act are limited. To give but a few examples: transportation at reduced rates of employees and supplies of a construction company working under contract for a railroad is not a rate discrimination in violation of the Act. *Sante Fe Ry* v. *Grant Bros.*, 228 U.S. 177 (1913). A railroad has no statutory duty to carry sterling and goldware, when it has never carried the articles before, and more appropriate alternative carriage is available. *Emporium* v. *New York Cent. R.R.*, 214 I.C.C. 153 (1936). "Limited and special services" may be provided at less than legal freight rates upon the request of shippers of a unique commodity such as a circus train. *Transportation of Circuses and Show Outfits*, 229 I.C.C. 330 (1956).

Petitioners place great reliance on the common law's recognition that efficiency of carriage is sometimes best served by allowing carriers to limit their extensive common-carrier liability for damage to goods transported. In such cases, a common carrier was seen to act as a "private carrier, or bailee for hire"—confusing language, perhaps, to describe a contractual exception to carriers' common-law duties. But even at common law, a carrier could not put off its common-carrier status by mere contractual provision. An early Supreme Court opinion rejected such formalism:

> The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods [?]

New York Cent. R.R. v. *Lockwood*, 84 U.S. 357, 376 (1873). *Accord, Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U.S. 397 (1889).

Petitioners argue that the existence of such contracts renders them "private," and not common carriers. We recognize that "[a] common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, *as a matter of accommodation or special engagement*, he undertakes to carry something which it is not his business to carry." *Lockwood, supra*, at 84 U.S. 377; *Phenix, supra*, at 129 U.S. 440 (emphasis added). Thus, for example, an extraordinary contract to transport a special circus train at reduced rates, with limitations on liability for damages, may be enforceable, when the contract is not against public policy. *Chicago, M.&St.P. Ry.* v. *Wallace* 66 F. 506 (7th Cir. 1895). As a matter of special engagement, a railroad may "privately" carry precious metals for the United States Government, and may recover the contractual transport fee in an action at law. *United States* v. *Louisville & Nashville R.R.*, 221 F.2d 698 (6th Cir. 1955).

Several of the petitioners have, like the plaintiff in the *Louisville & Nashville* case, carried goods for the Government under "§ 22"[4] rate quotations. Following the rule of the *Louisville & Nashville* case, we must disagree with the administrative law judge's conclusion in the present case that the mere quoting of rates for the transport of commodities under the former § 22 of the Act renders subsequent transport of the same commodities for private shippers subject to all of the Act's provisions. Rather, it is the long history of the present petitioners' carriage of nuclear materials, and the continuing national need for such carriage, which takes the petitioners'

[4] The former 49 U.S.C. § 22 allowed common carriers to furnish transportation to the United States Government at fees less than those prescribed under published rates. *See* 49 U.S.C.A. § 10721 (1979 Supp.).

transport of nuclear materials from the realm of "accommodation or special engagement" where the Act's ratemaking provisions do not apply.

By the year 1985, the record shows, one quarter of the electric power used in the United States may be produced by nuclear fission reactors. The spent fuel from these reactors must be transported for reprocessing, and the low-level reactor wastes, such as radiation-contaminated work clothing, must be transported for disposal. No other mode of transportation is more suited to the economical carriage of these materials than train carriage, according to the findings of the Commission. And it is the Commission which has primary jurisdiction to execute the National Transportation Policy's mandate "to recognize and preserve the inherent advantage of each mode of transportation. . . . " 49 U.S.C.A. § 10101 (1979 Supp.); *see, e.g., Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963).

The Commission has found that truck shipment of nuclear wastes would, because of the greater number of smaller shipments required, increase the probability of accidents involving nuclear materials, and, even if no mishap occurs, result in greater exposure to radiation of transportation workers and the general populace. If the Congressional delegation to the Commission of power to implement the National Transportation Policy is to be effective, the Commission must have the statutory authority exercised by its order; we further conclude that the Commission's preference of rail over truck carriage of spent fuel is both within the Commission's primary jurisdiction and supported by substantial evidence.

The railroads' common-carrier duties in the carriage of nuclear materials must be seen to flow from their role in effecting the National Transportation Policy. These duties are not dependent upon railroads' characterization of themselves as "private" carriers in contracts of carriage, nor upon their supposedly conscious refusal to "hold themselves out" for carriage of nuclear materials. This "holding out" may have indeed been one of the earmarks of common carriers at

common law; but in the almost one hundred years since the passage of the Act there has developed a new "common" law of transportation under which the public duty of railroads has been broadened beyond that extant under the common law of carriers. It is not only "common carriage," but transportation which is subject to the Act and to the Commission's statutory powers. *See, e.g., Cincinnati, N.O.&T.P. Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971); *Republic Carloading Co.* v. *Missouri Pacific R.R.*, 302 F.2d 381 (8th Cir. 1962) (per Blackmun, J.). A carrier's statutory duties run not to shippers alone, but to the public. *Brotherhood of Ry. Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238 (1966). Therefore, public needs must shape the boundaries of these duties.

III. THE SAFETY ISSUE

The petitioners' second basic contention is that the Commission failed to consider sufficiently the safety of the carriage of nuclear materials by the *particular* railroads which were before the Commission. The railroads argue that the commodities involved in this case have a unique potential for harm in the event of a rail accident; petitioners have even trumpeted their "lamentably poor" safety records in order to convince the Commission that petitioners were not fit for the regular carriage of reactor wastes, and that they could safely undertake carriage of nuclear materials only under private contracts. A typical private contract would contain clauses: (1) making service at the will of the carrier; (2) limiting the carrier's own liability in case of rail mishaps involving nuclear materials; (3) obliging the shipper to obtain connecting-line rail service; and (4) requiring special train service for the carriage of reactor wastes. The special trains in this service would comprise less than five cars, and would move only at low speeds over specially designated routes.

The Commission has already considered the advisability of special trains for the transport of spent nuclear fuel. In *Radioactive Materials, Missouri-Kansas-Texas R.R.*, ____ I.C.C. ____, No. 3607, Feb. 24, 1978, ("MKT case"), the Commission ordered the MKT to cancel its flagout from tariffs for the carriage of nuclear materials. The purpose of the flagout was to allow the railroads to charge rates enabling it to carry nuclear materials in special trains only. The Commission relied on *Delta Air Lines, Inc.* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976), in holding that its inquiry into the risks involved in the transport of nuclear materials must be limited to determining if the shipments meet the requirements of the Department of Transportation ("DOT") and the Nuclear Regulatory Commission ("NRC"). The Commission viewed a carrier's general assertion that shipments meeting DOT and NRC safety standards might be too hazardous to transport as an impermissible "collaterial attack" on the regulations of DOT and NRC.

The Commission's position is understandable in light of the transfer in 1966 of the power to regulate the safety of carriage of radioactive materials from the Commission to DOT. 18 U.S.C. §§ 831-35; 49 U.S.C. § 1655(e)(4) (1976). In 1975 the Hazardous Materials Transportation Act delineated the Secretary of Transportation's rulemaking powers in the transport of dangerous commodities:

> (a) Such regulations may govern any safety aspect of the transportation of hazardous materials . . . including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing (other than with respect to pipelines) of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold . . . for use in the transportation of certain hazardous materials.
>
> (b) Cooperation. In addition to other applicable requirements, the Secretary shall consult and cooperate with representatives of the Interstate Commerce Commission

> and shall consider any relevant suggestions made by such Commission, before issuing any regulations with respect to the routing of hazardous materials. Such Commission shall, to the extent of its lawful authority, take such action as is necessary or appropriate to implement any such regulation.

A second case in which the Commission considered the safety of rail transport of spent fuel and reactor wastes was *Radioactive Materials, Special Train Service, Nationwide,* ____ I.C.C. ____, No. 36325, March 8, 1978. In that case, four railroads sought approval of proposed tariffs which would have made special train service mandatory for the transport of nuclear materials. The Commission, in ruling on its jurisdiction in safety matters, clarified the meaning of its holding in the MKT case. The Commission's deference to the safety regulations of its sister agencies must extend only this far: a carrier may not ask the Commission to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT and NRC regulations governing such transport, and these regulations have been met.

Such a claim is properly made before the agencies entrusted with promulgating these minimum safety regulations.[5] "A carrier thus cannot refuse to haul any materials which meet [DOT and NRC] standards, but it may seek approval of a stricter practice which is shown to be just and reasonable." *Special Train Service* case, *supra,* slip op. at 4. We hold that the Commission has properly stated its role in regulating safety standards for rail transport of nuclear materials. It is entirely possible that, after the petitioners have published tariffs under which special trains would be required to haul these commodities, the Commission would approve tariffs and rates

[5] We cannot refrain from noting at this point that none of the petitioner railroads has availed itself of opportunities to comment upon the safety regulations of DOT and NRC concerning the rail transport of nuclear materials.

which would enable the individual railroads involved in *this* proceeding to provide special trains to carry nuclear materials, even though such special trains might not be required nationwide. In the Commission's review of the reasonableness of such proposed rates, numerous factors might be found distinguishing the eastern railroads from their counterparts elsewhere. Such factors might include: the frequency of the demand for carriage of nuclear materials in petitioners' territories; the amount of rail traffic in the areas served; the population density in the areas served; and track conditions and safety records of the railroads involved. These factual matters are properly to be explored after the publication of tariffs for the carriage of nuclear materials, not in deciding whether such publication should be ordered.

Questions of safety are also questions of risk of liability. A question of possible liability for damage resulting from carriage of a commodity is therefore within the Commission's jurisdiction as the regulator of the economics of interstate rail transport. We agree with the petitioners' statement that while DOT and NRC have exclusive authority to promulgate *industry-wide* standards for the carriage of radioactive materials, the ICC may allow *individual* carriers to make more (but not less) stringent rules for their own carriage of hazardous materials. This is in total agreement with the position taken by the District of Columbia Circuit in describing the safety jurisdiction of the Civil Aeronautics Board in *Delta Air Lines, supra,* which is analogous to the present case:

> Perhaps . . . the Board retains a small residue of authority over safety issues whereby it could impose hazardous cargo standards stricter (but not more lenient) than those of FAA/DOT, yet in general we believe that the Board should defer to the safety expertise of its sister agencies and accept the FAA/DOT positions on safety as establishing both an inner and an outer limit on its safety regulation.

543 F.2d at 260 (D.C. Cir. 1976) (footnote omitted).

In light of the Commission's eighty-year-plus history of sole jurisdiction of railroad safety standards, the gap in safety expertise between DOT and the Commission must be presumed to be less than that between the FAA and CAB. The CAB had exercised jurisdiction of aviation safety matters for barely twenty years prior to the creation of the FAA. *See* Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*[6] (1976), 72 Stat. 731; Civil Aeronautics Act of 1938, 52 Stat. 973. Accordingly, the comparison of the CAB with the ICC is not a perfect one; the Commission has more than a "small residue of authority over safety matters," as is evidenced by the statutory requirement that DOT confer with the Commission on the routing of rail shipments of hazardous materials.

For the reasons stated above, we conclude that the Commission had the statutory authority to order the eastern railroads to publish tariffs for the rail transportation of spent nuclear fuel and low-level reactor wastes. We further conclude that the Commission gave proper consideration to safety evidence offered by the railroads in justification of their never having published such rates. The petition of the railroads is therefore denied, and the Commission's order to publish rates affirmed.

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[6] Since 1976, the Federal Aviation Act has twice been the subject of amendments not material to the analogy drawn above. *See* 49 U.S.C.A. § 1301 *et seq.* (1979 Supp.).

APPENDIX C

INTERSTATE COMMERCE COMMISSION DECISION

No. 36312[1]

U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

v.

THE AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, et al

Served July 5, 1978

Decided June 26, 1978

Appeals of the initial decision served December 28, 1977, were filed by defendant railroads and by the trustees of the Chicago, Rock Island and Pacific Railroad Company, to which replies were filed by the U.S. Energy Research and Development Administration (now the Department of Energy), the U.S. Nuclear Regulatory Commission, and jointly by complainants other than Federal agencies. Complainants allege that the defendants' refusal to accept and transport irradiated fuel assemblies and radioactive waste as common carriers under published tariffs is in violation of section 1(4), 1(5), 1(6), 1(10), 1(11), 1(3), 6(1) of the Interstate Commerce Act and inconsistent with the National Transportation Policy. In his

[1] This decision embraces also No. 36313, Allied-General Nuclear Services, Et Al v. The Akron, Canton, and Youngstown Railroad Company, Et Al; No. 36330, GPU Service Corporation, Et Al v. The Akron, Canton and Youngstown Railroad Company, Et Al; No. 36335, Commonwealth Edison Company, Et Al v. The Akron, Canton and Youngstown Railroad Company, Et Al; and No. 36336, General Electric Company v. The Akron, Canton and Youngstown Railroad Company, Et Al.

initial decision the Administrative Law Judge found that the defendants are required under their common carrier duty to handle the involved commodities and to publish reasonable and otherwise lawful tariff provisions covering such transportation and that their failure to do so violates section 1(4) and 6(1) of the act and the National Transportation Policy. He ordered the defendants to cancel the flagouts here in issue and to publish reasonable and otherwise lawful tariff provisions covering the transportation of the irradiated fuel elements (spent fuel) and radioactive waste.

In their exceptions to the initial decision, the appellants allege that the Administrative Law Judge erred (1) in finding that defendants' action resulted in violations of section 1(4) and 6(1) of the act and the National Transportation Policy; (2) in finding that defendants were bound by their common carrier status to perform the involved transportation services; (3) in failing to consider safety evidence in determining the railroad's common carrier duty; (4) in finding that defendants' practice of tendering section 22 quotations is an admission of a common carrier duty; (5) in finding that the handling of nuclear materials on a negotiated basis would be onerous; (6) in failing to consider evidence relating to insurance and financial risks to the carriers; and (7) in finding no environmental impact.

Basically the same major issues as raised by the appellants here were presented to the Commission in docket No. 36307, *Radioactive Materials, Missouri-Kansas-Texas Railroad Co.*, decided by Division 2 on November 8, 1977 (the MKT case), and docket No. 36325, *Radioactive Materials, Special Train Service, Nationwide*, decided by Division 2 on March 8, 1978 (the special train case), and the determinations of those issues by Division 2 were adverse to the positions taken by the defendants here.

We find that the evidence considered in light of the appeals and the replies, does not warrant a different result from that reached by the Administrative Law Judge and that the

statement of facts, the conclusions and finding of the Administrative Law Judge are proper and correct in all material respects.

It is ordered:

The statement of facts, conclusions, and findings of the Administrative Law Judge are adopted as our own, with the following changes:

On sheet 3, third full paragraph, delete the last sentence and substitute the following:

> "Inasmuch as these issues have been determined by Division 2 in the MKT case and the Division's findings are equally applicable here, no further consideration need be given this matter."

On sheet 8, first paragraph, delete the last two sentences and substitute the following:

> "In view of Division 2's decision in the MKT case, the inquiry into the risks involved in transporting the radioactive materials under consideration here should be limited to determining that the shipments meet or exceed the requirements of DOT and NRC. Inasmuch as defendants have implicitly conceded that the safety requirements of those two agencies would be met, no further consideration need be given to defendants' assertions (1), (2), and (3) above."

The defendants are required and directed to cancel the flagouts here in issue and to publish reasonable and otherwise lawful tariff provisions covering the transportation of irradiated fuel elements (spent fuel) and radioactive waste.

This order shall continue in force until further order of the Commission.

By the Commission, Division 2, Commissioners Stafford, Murphy, and Clapp.

(S E A L)

NANCY L. WILSON
Acting Secretary

APPENDIX D

INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. 36312[1]

U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

v.

THE AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, et al

Served December 28, 1977

Defendants' flagouts found to be in violation of the Interstate Commerce Act. Defendants ordered to cancel such flagouts and to publish reasonable and otherwise lawful tariff provisions covering the transportation of the involved commodities.

OMER F. BROWN, II, JAMES F. BROMLEY, JOHN GUANDOLO, JOHN F. DONELAN, DONALD MACLEAY, MICHAEL F. MCBRIDE, JOHN K. MASER, III, CHARLES J. MCCARTHY, L. MANNING MUNTZING, REUBEN W. PETERSON, C. WESLEY SMITH, and RUDOLF C. RAVASZ for complainants.

[1] This report embraces also No. 36313, Allied-General Nuclear Services, Et Al v. The Akron, Canton, and Youngstown Railroad Company Et Al; No. 36330, GPU Service Corporation, Et Al v. The Akron, Canton and Youngstown Railroad Company, Et Al; No. 36335, Commonwealth Edison Company, Et Al v. The Akron, Canton and Youngstown Railroad Company, Et Al; and No. 36336, General Electric Company v. The Akron, Canton and Youngstown Railroad Company, Et Al.

JAMES O. CHRISTY, ANGELICA P. DIDIER, RICHARD W. KIENLE, CHARLES E. MECHEM and JAMES R. PASCHALL for defendants.

GUY H. CUNNINGHAM, III, JOSEPH DiSTEFANO, and HUDSON B. REGAN for the United States Energy Research and Development Administration.

STEPHEN F. EILPERIN, RICHARD S. MALLORY and PETER L. STRAUSS for the United States Nuclear Regulatory Commission.

BY FOREST GORDON, ADMINISTRATIVE LAW JUDGE:

In the title proceeding, as well as the four proceedings listed in footnote 1 which were consolidated by the Interstate Commerce Commission's order of April 19, 1976, the complainants are seeking a Commission order finding defendant railroads to be common carriers of spent nuclear fuel assemblies and radioactive waste material. They also request that defendants be required to provide rail transportation of these commodities pursuant to lawful classification ratings published in tariff schedules on file with the Commission and, that defendants be order to cease and desist from requiring or using private contracts for carrying these commodities. Complainants allege that defendants' action are in violation of sections 1(4), 1(5), 1(6), 1(10), 1(11), 1(3), 6(1) of the Interstate Commerce Act and inconsistent with the National Transportation Policy.

Under special rules or procedure, the evidence of complainants and defendants was reduced to writing and exchanged among the parties prior to oral hearing. Thereafter, the proceeding was assigned to the Administrative Law Judge for hearing, cross-examination of certain witnesses, and the preparation of an initial decision. Hearings were held in Washington, D.C., on November 30 to December 3, 1976, for cross-examination of complainants' witnesses; on February 7 to 11, 1977, for cross-examination of defendants' witnesses; and, April 4 to 6, 1977, for cross-examination of complainants' rebuttal witnesses. Briefs were filed by all parties.

BACKGROUND

This is the third proceeding assigned to me for hearing and initial decision involving the transportation of irradiated or spent fuel assemblies and radioactive waste. In 36307, *Radioactive Materials, Missouri-Kansas-Texas R. Co.,* (MKT) my initial decision was served on April 28, 1977 and in 36325, *Radioactive Materials, Special Train Service, Nation Wide* (Special Train), my initial decision was served on August 24, 1977. The background material relating to the nuclear energy fuel cycle, the importance and growth of nuclear energy, and the description of the casks used to transport radioactive material, as described in the other two proceedings, is equally applicable to the circumstances in the subject proceeding and will not be repeated herein. Docket 36325 involves an investigation by the Commission into an effort by the Southern and Western railroads to amend their common carrier tariffs covering the transportation of nuclear materials by adding the requirement that these materials be handled in special train service. Docket 36307 is also an investigation by the Commission into efforts by the Missouri-Kansas-Texas Railroad to flag out of its common carrier tariffs covering the transportation of nuclear materials and thereby terminate its status as a common carrier in respect to these commodities. The subject proceeding herein, although a complaint proceeding, is very much like the MKT case in that the defendant railroads renounced their common carrier obligations to transport nuclear materials. It is interesting to note that the railroads involved in the Special Train case acknowledged their common carrier status, but the MKT and those involved in the subject proceeding have renounced any obligation to transport the involved commodities as common carriers.

The Commodities Involved

Spent fuel is the common name applied to fuel assemblies which have been removed from a light water nuclear reactor after having become irradiated. The fuel assemblies consist of ceramic pellets of enriched uranium encased in metal rods or "cladding". As the fuel becomes irradiated, it is necessary to remove some of the assemblies each year and replace them with fresh assemblies. The spent fuel, after being stored under water for at least 180 days, must thereafter be shipped to reprocessing or storage facilities in specially designed casks due to their radioactivity. There is no danger of explosion, but there is a serious danger of contamination.

In addition to the spent fuel assemblies, there are high and low level wastes that require transportation. High level waste is the residue of spent fuel which remains after the recoverable materials have been separated from the spent rods. It is solidified by a calcination or vitrification process and shipped to a Federal repository. Low level waste is material with low radioactivity, most of which has become incidentally contaminated in the operation of a reactor and accumulates at the reactor site. It includes such items as contaminated overalls, wiping cloths and tools, resins, filters and miscellaneous compacted trash. Low level waste is shipped to a commercial burial ground in either 55 gallon steel drums or fiberglass coated boxes in cargo containers.

During the 12 days of hearing there were generated 2,056 pages of transcript and 112 exhibits. A major portion of the testimony and exhibits dealt with matters of safety and insurance indemnity. Defendants' primary justification for their flagouts is that common carriage of radioactive materials presents extraordinary risks against which they have inadequate protection. For these reasons defendants negated their common carrier role and would only agree to transport the involved commodities under private contract. Complainants, on the other hand, took the position that the Commission may not

inquire into matters of safety because it lacks statutory authority to establish safety or insurance indemnity standards or to allow any carrier to do so. They argued that the Federal regulatory framework governing the safe shipment and carriage of radioactive materials and the insurance indemnity aspects thereof has been prescribed by Congress, which has vested exclusive control over those activities in the United States Nuclear Regulatory Commission (NRC) and the Department of Transportation (DOT). In the prior two proceedings the same assertions were made by the railroads and complainants took the identical position in respect thereto as taken herein. Over the strong objections of complainants and NRC, I allowed the railroads to introduce evidence bearing on safety and insurance matters, as I did in the earlier proceedings.

On November 11, 1977, Division 2 issued its decision in 36307 after reviewing my initial decision and exceptions and replies thereto. The Division concluded that the scope of my inquiry into the safety issues was too broad and that the assertion by respondent MKT that the shipments in question, although meeting DOT and NRC requirements, are too hazardous to transport in common carriage amounts to a collateral attack on those two agencies, citing *Air Line Pilots Association International* v. *C.A.B.*, 516 F.2d 1269 (2 Cir. 1975). The Division agreed with complainants herein that the Commission is not empowered to decide matters of safety and that any attack on safety regulations should be brought before NRC and DOT. They concluded further than any inquiry made by the Commission in this regard should be limited to determining whether the shipments meet the safety regulations promulgated by those two agencies.

Therefore, in recognition of the Division's findings and since defendants raised no issue as to compliance with DOT and NRC standards, any discussion or findings by me regarding safety matters would be an exercise in futility. In addition, the Division in rejecting respondent's assertion that the District Court's decision in *Carolina Environmental Study Group* v.

United States, 431 F. Supp. 203 (W.D. N.C. 1977), leaves it without adequate insurance coverage should a transportation accident involving radioactive active materials occur, inferred that the Price-Anderson Act provided adequate insurance coverage. Thus, these matters will not be considered.

Complainant's Evidence

The complainants include the United States Energy and Reserach Development Administration (ERDA), the Power Authority of the State of New York (PASNY) which operates two nuclear plants, 15 electric utility companies and the service company for 3 others (all listed in Appendix A). In addition, there are four companies which are engaged in various phases of the nuclear fuel cycle, including Allied General Nuclear Services (AGNS), which has constructed a plant at Barnwell, S.C., to reprocess spent nuclear fuel under contract with power companies located throught the nation; NL Industries, Inc., (NL) which is engaged in many phases of the nuclear fuel cycle, ranging from the milling of uranium ore through the processing of uranium ore for utilization to the design, manufacture, and operation of large shielded casks for the transportation of spent nuclear fuel (including the presently licensed NLI 10/24 cask), and which, by subcontract, has undertaken the responsibility for assuring the proper packaging and transportation of spent nuclear fuel from the nuclear generating plants of electric utilities with which AGNS has reprocessing contracts to Barnwell for storage and reprocessing; General Electric Company, which has designed, uses, and leases to others a presently licensed container (the IF-300 cask) for transporting spent nuclear fuel and which also operates a plant at Wilmington, N.C., manufacturing nuclear fuel that is shipped to power companies in all parts of the country and it operates an irradiated fuel storage facility at Morris, Ill.; and Exxon Nuclear Company, Inc., which operates nuclear fuel

fabrication and conversion facilities in the State of Washington and has applied to NRC for authority to construct and operate a nuclear fuel reprocessing plant in Tennessee.

The United States Nuclear Regulatory Commission entered a limited appearance for the purpose of stating its position that the Interstate Commerce Commission is without jurisdiction to decide questions of health, safety, insurance and indemnity where radioactive materials are concerned. DOT did not enter an appearance.

Complainants contend that defendants' flagout on ratings for spent nuclear fuel and radioactive waste as contained in Items 80762-B and 80764-B of Supplement 12 to Uniform Freight Classification 12 I.C.C. 8 are unlawful and in violation of the Act and the National Transportation Policy. The description of the two items are as follows:

> 80762-B—Fuel elements, nuclear reactor, irradiated and requiring protective shielding, also irradiated parts or constituents, in containers required by I.C.C. regulations, see Rule 39, shipper to Atomic Energy Commission-owned or licensed sites for chemical processing, see Notes 1, 2, 3 and 5, Items 80766-B, 80767-B, 80768-B and 80769.5-A;
>
> 80764-B—Waste materials having no reclamation value, requiring protective shielding, or requiring radioactive-materials labeling, marking or placarding, in containers required by I.C.C. regulations, see Rule 39, shipped to Atom Energy Commission-owned sites operated by contractors or licensees of the Atomic Energy Commission for disposal, see Notes 1, 3 and 5, Items 80766-B, 80768-B and 80769.5-A.

The defendants have flagged out from Items 80762-B and 80764-B[2] by Item 80768-B, which states:

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[2] These items are inaccurate. The references to I.C.C. and the Atomic Energy Commission should be to DOT and NRC.

80768-B—Note 3-Ratings will not apply on traffic moving from or to points on or routed via the following line lines:. . . . . .

The "following lines" include the Eastern railroads, the Rock Island, the Soo Line, the M-K-T and the Illinois Terminal Railroad Company.

The flagout of the Eastern railroads has been in effect since December 1962. Because of this flagout, there are no tariff provisions under which spent fuel or radioactive waste can be shipped over the lines of the defendant railroads. Complainants state that until recently this was not critical. Defendants have transported the commodities in question for the past 25 years for ERDA, but this was performed under section 22 quotations. That situation has now changed in both respects. With the marked increase in the number of commercial nuclear plants, rail transportation for private shippers has become essential and section 22 quotations no longer meet ERDA's needs since the railroads have refused to carry these shipments except in special trains even under section 22.

Complainants assert that reliable and efficient service by rail is vital to the entire nuclear energy program and the nation's economy and welfare. The only alternative to rail service would be truck transportation which complainants state would be impractical, inefficient and uneconomical. The casks employed to transport spent nuclear fuel were designed after extensive study of the various transportation modes such as legal-weight truck, over-weight truck, rail and barge. The rail casks decided on were the result of both logistical and economic considerations. A legal weight truck container will hold less than 0.5 metric tons of spent fuel, whereas a rail container can hold over 3 to 5 metric tons of the same fuel. In consequence, one would need 7 to 10 times more shipments by truck than by rail. If truck shipments were the primary method of shipping spent fuel, the operational problems involved in handling the substantially increased number of shipments would make it

impracticable to operate a large reprocessing plant such as that being built at Barnwell at more than a fraction of its rated capacity. Exclusive use of truck shipments to this plant would require over 3,000 shipments per year, as opposed to only 300 to 500 shipments by rail. The same situation would hold true at reactors operated by electrical utility companies. PASNY states that 18 spent fuel assemblies could be loaded in a rail cask in 29.25 hours, whereas it would take 209.25 hours to load the same assemblies in the 9 truck casks that would be required.

Complainants further charge that limitation to truck transportation would greatly increase the number of miles traveled and the number of people involved in handling the cask at the reactor, reprocessing plant, and waste disposal site. Many local jurisdictions require that trucks carrying radioactive materials only move during certain hours of the day and over prescribed routes away from the cities. Some also require special permits and accompanying guard or escort cars.

Having established that rail service is superior to truck service in the transportation of nuclear materials, complainants charge that the rail service required must be common carrier service. The offer by defendant railroads to furnish transportation only after negotiation of private contracts by individual railroad with each individual shipper they term as a disaster. Complainants introduced copies of contracts tendered as a basis for transporting nuclear fuel which differed to a marked degree. If this practice is tolerated, complainants state it would present a totally chaotic complex of individual railroads as distinct from the inter-connected, unified system of rail transportation which exists under the regulation of the Commission. Where two or more railroads are involved, the shipper will be obliged to reach an individual agreement with each railroad. The terms which might be acceptable to one railroad are not necessarily acceptable to other railroads. There will also be the anomaly that shipments between given origins and given destinations would often move partly over Southern and Western railroads who concede that they are common carriers

subject to regulation by the Commission. Up to the point of connection with one of the defendants, the movement would be governed by the tariff provisions of the Uniform Freight Classification. From there on it would be governed by whatever type of contract being negotiated. Such an arrangement, argue complainants, would work a travesty upon the National Transportation Policy and its stated objective of a national transportation system by rail adequate to meet the needs of the commerce of the United States and of the national defense.

Complainants charge that there are at least four fundamental deficiencies with contract carriage of spent nuclear fuels and radioactive waste materials, all of which relate to the absence of a suitable forum for redress of shipper grievances and prevention of carrier abuse which the Act was intended to provide. First, contract transportation is service, or non-service, at the will of the defendants; second, there is no assurance of what the charges for the service provided are to be, since there would be no governmentally approved procedures for establishing, maintaining, or changing such charges; third, there is no limit on what terms and conditions might be unilaterally imposed by the railroads with the result that such terms and conditions for rail transportation over the defendant railroads might become so burdensome as to amount to a de facto embargo of these items; and fourth, shippers would be confronted with a veritable hodgepodge of individual railroads with whom individual contracts must be made and with no genuine assurance that it will ever be possible to transport spent nuclear fuel, radioactive waste materials, or empty containers from given origins to given destinations.

Complainants on brief make reference to admissions by a spokesman for defendants during cross-examination that the railroads would set the terms of the individual contracts, that one railroad would not be governed by the terms of the contracts of other railroads, and that explicitly or implicitly,

they would reserve the right to refuse to transport radioactive shipments. Under such conditions, complainants believe that the nuclear energy program would be unable to function.

Complainants assert that there is no valid reason why the involved commodities cannot be handled under published tariffs. If the railroads require special safeguards and conditions, such provisions can be spelled out in an appropriate tariff. The Southern and Western railroads did not see fit to renounce their common carrier duty, instead they published a tariff subject to the Commission's jurisdiction which provided for the conditions they deemed appropriate. Defendants herein have provided no valid reason why they have taken a position so different from the other railroads. Complainants charge that the reasons are clear, the defendants do not want to handle the involved commodities under published tariffs because they want to assess charges and require terms and conditions which they believe the Commission would hold to be unreasonable.

Complainants charge that defendants have treated and are continuing to treat their carriage of the involved commodities as common carriage. This charge is based on documents obtained through discovery procedures which are memoranda and letters exchanged between members of defendants' rate bureau the Traffic Executives Association-Eastern Railroads (TEA). This is a section 5a organization which section provides that common carriers may form what may here be called "rate bureaus" to engage in concerted activities that otherwise would violate the Antitrust Laws. Complainants assert that the Commission has approved these organizations only on the basis that their members are common carriers and that what they do through these organizations will be as common carriers subject to the Commission's jurisdiction under the Act. They cite *Eastern Railroads-Agreements*, 277 I.C.C. 279 (1950) wherein the Commission on page 288 stated:

> Rates which are initiated under the procedures of the agreement must, before becoming effective, be filed with us

and thereby become subject to all regulatory processes of the act.

Defendants have used their rate bureau to issue section 22 quotations to the former Atomic Energy Commission and ERDA for transportation of radioactive materials. The section 22 quotations were arrived at by agreement. ERDA would make a specific request for a rate, the carriers would agree among themselves as to the rate and its specifics, and then have TEA establish it and offer it to ERDA as jointly representative of all the participating competing lines. These section 22 quotations include rates over different competing parallel rail lines to the same destination, concurrences from all connecting lines, and single bills of lading for through movements. Complainants allege that defendants considered themselves as common carriers and acted as such when they acted in concert to publish quotations to ERDA for the transportation of radioactive materials under section 22.

ERDA states that the defending carriers' refusal to publish and maintain tariff provisions on the involved commodities hampers attainment of the nation's energy goals and is damaging to the urgent needs of the country and the national defense. Up until recently section 22 quotations for government shipments were at the level of classification ratings. Today the section 22 tenders contain a mandatory special train requirement and the level of the rates are on the basis of local rates that are substantially higher than the classification ratings. Section 22 permits carriers to offer the Government free or reduced rates. It does not permit the carriers unilaterally to impose rates that are higher than classification ratings. ERDA argues that this action, when combined with the refusal to publish tariff rates, effectively constitutes an embargo of government traffic and a potential violation of section 6(8) of the Act. Therefore, defendants ability to change the section 22 tenders unilaterally so as to include onerous terms like mandatory special trains, now justifies ERDA in seeking tariff rates that heretofore have not been as necessary as they are today.

Defendants' Evidence

It is the position of the Eastern railroads that they are not common carriers of nuclear materials because (1) these commodities have unique characteristics, (2) their transportation presents unique hazards unlike those associated with the handling of any other freight which the railroads carry, (3) the transportation of nuclear materials requires special precautions, and (4) since the very coming into existence of these commodities the Eastern railroads have expressly and clearly served notice by means of the flagout in the Uniform Freight Classification Tariff that they were not common carriers of nuclear materials. As stated earlier herein, matters of safety will not be considered because of Division 2's decision in the MKT case. Therefore, defendants assertions above in (1), (2), and (3) will not be given any consideration in deciding the issues involved.

Defendants believe that the applicable law entitles them to continue to maintain the policy which they have consistently held in the past, namely that they are not common carriers of nuclear material and that they are entitled to negotiate contracts defining the terms under which they will handle such commodities. They state that a key factor in deciding whether a company has a common carrier obligation to transport a commodity is whether the carrier held itself out publicly to carry it. Defendants claim that they expressly denied common carrier status in their 1959 contract which they entered into with the United States Government underlying their section 22 quotations on the transportation of the involved commodities. Also, they point out that they have flagged out of the Uniform Freight Classification from the beginning of publication of ratings on those commodities and that their position differs from that of the MKT in that the MKT initially participated in the published ratings and only recently attempted to flag-out of the Uniform Freight Classification.

Defendants charge that complainants are attempting to fabricate a history of common carriage by shreds of irrelevant evidence obtained through burdensome and extensive interrogatories which were no more than fishing expeditions, the answers to which were introduced as exhibits and accepted by the judge. In addition, they renew their motion on brief to exclude exhibits 74, 75 and 76 which involve correspondence between a representative of defendants and a government shipper. The contents deal with the railway car fleet designed to transport radioactive materials. The letters were included in work papers of a testifying witness and do not show a concerted action on the part of defendants to set rates, nor do they have any relevance to this proceeding. This motion is again denied.

Contrary to the argument by complainants, defendants assert that the transportation of nuclear fuel and related materials for the government under section 22 quotations does not constitute a public holding out. Only the government may ship under such quotations. Section 22 provides a somewhat anomalous type of carriage, which, while within the scope of the Act, is different from common carriage, if for no other reason than that it does not result in generally available rates and does not involve a public holding out.

Defendants admit that they have had joint movement of government traffic with Western and Southern railroads, who have not flagged out of the Uniform Freight Classification, and the relationships necessary to effect these movements. However, they maintain that this does not constitute a public holding out and gives no indication of the status of the carrier moving the traffic. Defendants argue further that their collective actions through rate bureaus, as complainants contend, do not constitute common carriage. While the TEA publishes section 22 quotations, it does not negotiate them. Thus, this activity does not constitute rate bureau action in the normal sense. Even if it did, defendants believe that while section 22 quotations would fall within the coverage of the Act and hence the rate bureau protection under section 5(a), such quotation

would lie outside common carriage, because section 22, although part of the Act, does not involve rates available to the general public.

Discussion and Conclusions

The central issue herein is whether defendants have a common carrier and statutory obligation to accept and transport under published tariffs spent nuclear fuel and radioactive wastes tendered to them by complainants. Complainants who have the burden of proof under section 15(1) of the Act allege that railroad defendants under section 1(4) have a duty to provide and furnish transportation upon a reasonable request therefor. As was argued by respondent in the MKT case, railroad defendants herein preliminarily contend that issues arising from an alleged failure to furnish service under section 1(4) are matters for judicial, not Commission consideration, citing *U.S.* v. *Pennsylvania R. Co.*, 242 U.S. 208 (1916), and *Cancellation of CRI&P & Soo Line Rates-Livestock*, 340 ICC 463 (1972). In the MKT case I found that jurisdiction does lie with the Commission since other sections of the Act, in addition to section 1(4), were simultaneously involved, citing *Duralite Co. Inc.* v. *Erie Lackawanna Ry. Co.*, 339 ICC 312, 314 (1971). Division 2 in its report on the MKT case agreed with my findings.

Complainants state that their requests for transportation are reasonable in that all that is required of defendants is to transport a shipment that is loaded by consignor and unloaded by consignee. The shipments are not oversized and within the weight limits prescribed by railroads in general. The railroads will not be required to obtain or furnish any type or amount of equipment they do not already have. Defendants refusal to provide the service requested as common carriers because of the hazardous nature of the commodities and alleged inadequate protection in the case of an accident provides no excuse. As mentioned earlier herein, Division 2 has already found in the

MKT case that questions of safety which have been passed on by NRC and DOT cannot be used as a defense by the railroads for negating their common carrier status. These matters should be raised before those two agencies and not the Commission. The Division also found that the indemnity protection afforded by the Price-Anderson was adequate.

Having removed defendant's main defense, there remains the assertion by the railroads that they have a right to declare that they will not act as common carriers regarding the transportation of certain commodities. Exceptions from the railroads' common carrier duty as declared in section 1(4) have been narrowly circumscribed. The Commission has allowed railroads to decline to transport commodities that are shown not to be suited for common carrier rail service as in the case of circuses and goods of extraordinary value. In transporting circuses the Commission took notice of the peculiar nature of this service, namely the difficulties in handling wild animals, irregular scheduling requirements to meet specified show times, and the problem in assessing charges and preparing waybills for the items and personnel being moved. See *Transportation of Circuses and Show Outfits*, 299 ICC 330 (1956). None of these factors are present in these proceedings.

Also, the Commission has allowed the exclusion of commodities of high value such as gold, silver, coin or currency, bank bills and precious metals from common carrier rail service. This was permitted because of the recognition that such articles are of extremely high value and attractive to thieves and that these commodities may be shipped by parcel post and express companies which are better suited to provide such services. See *Emporium* v. *New York Central R. Co.*, 214 ICC 155 (1936). The commodities involved herein are certainly not susceptible to theft and no other mode of transportation is better equipped to handle them.

Lastly, the Commission did declare that a common carrier may cease to hold itself out to transport a commodity if it proves there there is no present public need for it to transport

the commodity and no reasonable prospect of such demand, particularly where the carrier would need to maintain special facilities incidental to the service. See *Livestock, South, Southwest, Central and Western Territories*, 346 ICC 418 (1974). Defendants argue that complainants alleged need for the service was the prospective movement of fuel cores between electric generating stations and reprocessing plants. They point out that there are no reprocessing plants now in operation and that the "Statement By the President on Nuclear Power Policy," issued April 7, 1977, that commercial reprocessing of spent fuel will be deferred leaves considerable doubt as to whether any reprocessing plants will ever become functional. Therefore, there is no need for the requested transportation. The record as made herein shows, however, that spent fuel has been stored at reactor sites for several years, and that storage space is being exhausted. On-site storage, therefore, is only a stop-gap measure; the spent fuel must soon be moved in shielded casks by rail to regional storage centers to prevent the closing down of commercial reactors. In addition, there is no need herein for defendants to maintain special facilities incidental to the service as shown in *Livestock, South, Southwest, Central and Western Territories*, supra. If complainants have no need for defendants' services, as the railroads argue, then it will not be called upon to provide such service and there would be no effect on defendants' operations.

Hence, none of the bases on which the Commission heretofore has excused railroads from their common carrier duty have any application to the facts of record in these proceedings. Upon concluding that defendants are in violation of section 1(4) and that they have a duty to provide service as common carriers, it is of little consequence whether defendants have held themselves out to be common carriers in the past, or that prior conduct in negotiating and providing section 22 quotations to the government were common carrier practices. The fact is that defendants are common carriers, bound by section 1(4) of the Act to provide and furnish transportation to

shippers upon a reasonable request which defendants have refused to do. Defendants as common carriers are not free to pick and choose which commodities they will carry in common carrier service and which commodities they will transport as private carriers.

As a make weight, I do believe that defendants tender of section 22 quotations is an act of a common carrier. Section 22 expressly refers to "common carriers" all through its provisions. That section logically can only be used by common carriers subject to the Act. It merely provides an exemption to a carrier, upon agreeing to provide preferential service to the government, from the responsibilities placed upon it by other sections of the Act designed to protect commercial shippers. That exemption has meaning only if a carrier is a common carrier otherwise subject to the Act. The voluntary tender of a quotation pursuant to section 22 is a tacit admission that the carrier is otherwise subject to Commission regulation and requires the exemption of section 22 to grant the preferred rate to the government.

Complainants charge that defendants refusal to publish schedules showing all the rates, fares and charges for transportation between points on their own routes and between those points and those on routes of other carriers violate section 6(1) of the Act. Testimony showed that shippers using the lines of defendants will only be able to do so under individual contracts. Each shipper will have to negotiate an individual contract with the Eastern railroads on a basis that is wholly independent of the services supplied by railroads that continue to participate in the Uniform Freight Classification. No shipper will know in advance the terms of the contract to be negotiated, nor how long the negotiations will take. Moreover, under the terms of sample contracts exhibited in the record, the railroad reserves the right of refusal to transport any shipment and the right to terminate the contract. The uncertainty and potential delay surrounding attempted use of defendants' lines would render the service unavailable. I am inclined to agree with

complainants that defendants insistence on private contracts for each shipment is tantamount to an embargo against the commodities involved. In addition, as I found in the MKT case, the proposal by defendants to move the subject traffic only under negotiated conditions leaves them free to enter into special deals with favored shippers and to offer, or be pressured into offering, concessions that published tariffs would forestall. Defendants concede that as private carriage, complainants would have no recourse to the Commission to seek redress of unjust and unreasonable rates and practices. They suggest that complainants would have access to the courts or the election to use alternate means of transportation. It is well known that court action in transportation matters is mainly a last resort. The Commission would be avoiding its obligations under the Act if it were to foister its duties on to the courts. It was shown earlier herein that there is no reasonable alternative means of transportation for irradiated cores and radioactive waste. It is apparent that defendants refusal to provide common carrier service is a violation of section 6(1) of the Act.

The record will also support a finding that defendants' refusal to publish and maintain tariff provisions on the involved commodities hampers attainment of the nation's energy goals and could be damaging to the energy needs of the country and to the national defense. The demand by the defendant railroads from commercial shippers of contracts on a shipment-by-shipment and carrier-by-carrier basis impedes the movement of the commodities involved and is an unwarranted burden on the shippers. In addition, the onerous terms demanded in section 22 quotations places a similar burden on government shipments. It follows then that defendants' actions herein are in violation of the National Transportation Policy which requires that the Commission "promote safe, adequate, economical and efficient service and faster sound economic conditions in transportation... all to the end of developing, coordinating, and preserving a national transportation system

by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

From the evidence presented, I am of the opinion, and so find that defendants' refusal to accept and transport irradiated fuel assemblies and radioactive waste as common carriers under published tariffs is a violation of sections 1(4), 6(1) of the Interstate Commerce Act and the National Transportation Policy.

Environmental Considerations

On August 23, 1977 the Environmental Staff of the Commission served a final environmental impact statement designed to assess the environmental impacts associated with the subject proceedings and those in Dockets 36307 and 36325. The statement recognized the fact that until an actual tariff is filed by defendants herein and respondent in Docket 36307, the environmental aspects of the transportation involved could not be assessed. Therefore, the statement concentrated on Docket 36325, the subject of which was a special train tariff. Thus, the question of whether the shipments should move in special or regular trains and the environmental impact associated with those movements is not a matter the Commission need to concern itself with this record and at this time. The order to be issued herein will require defendants to cancel their flagouts and to publish tariff provisions covering the transportation of the involved commodities. Upon the filing of such tariffs, the Commission will have an opportunity to determine the lawfulness of the conditions of carriage and to assess the environmental impact. Consequently, I conclude that this decision is not a Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Contentions of the parties as to fact or law which are not specifically discussed hereinabove have been given due consideration and are found to be either not materially significant or not justified.

Ultimate Findings and Order

Upon consideration of all evidence of record, the Administrative Law Judge concludes and finds that the flagouts of the defendants to the Uniform Freight Classification, as described earlier herein, contravene the provisions of sections 1(4) and 6(1) of the Interstate Commerce Act and the National Transportation Policy;

It is the ORDER of the Administrative Law Judge, That the defendants be, and they are hereby, directed to cancel the flagouts here in issue and to publish reasonable and otherwise lawful tariff provisions covering the transportation of irradiated fuel elements (spent fuel) and radioactive waste.

IT IS FURTHER ORDERED, That this order shall continue in force until further order of the Commission.

Dated at Washington, D.C., this 16th day of December, 1977.

By the Commission, FOREST GORDON, Administrative Law Judge.

H. G. HOMME, JR.
Acting Secretary

(SEAL)

APPENDIX A

Complainant Electric Utility Companies

Commonwealth Edison Company
Houston Lighting & Power Company
Kansas City Power and Light Company
Kansas Gas and Electric Company
Niagara Mohawk Power Corporation
Northern States Power Company
Pacific Gas and Electric Company
Pennsylvania Power & Light Company
Philadelphia Electric Company
Public Service Company of Indiana, Inc.
Rochester Gas and Electric Corporation
Southern California Edison Company
Union Electric Company
Vermont Yankee Nuclear Power Corporation
Virginia Electric & Power Company
GPU Service Corporation-Holding Company for
Jersey Central Power & Light Company
Metropolitan Edison Company
Pennsylvania Electric Company

APPENDIX E

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 78-3425

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents,

and

GPU SERVICE CORPORATION, *et al.*,
Intervenors.

Before: CELEBREZZE, Circuit Judge, and PHILLIPS and PECK, Senior Circuit Judges.

Filed December 20, 1979

ORDER

On petition to review an Order of the Interstate Commerce Commission,

This cause came on to be heard on the transcript of the record from the Interstate Commerce Commission and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition to review the Order of the Interstate Commerce Commission be and it is hereby denied, and the Commission's order to publish rates affirmed.

It is further ordered that Respondents recover from Petitioners the costs on appeal as itemized below.

ENTERED BY ORDER OF THE COURT.

JOHN P. HEHMAN
Clerk

APPENDIX F

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT

Section 1(1), 49 U.S.C. § 1(1), *now* 49 U.S.C. § 10501, provided:

> The provisions of this chapter shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—
>
> (c) Repealed, June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102.
>
> From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

Section 10501, 49 U.S.C. § 10501, provides:

> (a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent that the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia)

and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle; or

(2) transportation by a water common carrier when that transportation would be subject to this subchapter only because the water common carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, a switching, terminal, lighterage, car rental, trackage, handling, or other charge by a rail carrier for services in the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(c) This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

Section 1(4), 49 U.S.C. § 1(4), *now in pertinent part* 49 U.S.C. § 11101, provided:

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classfications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates,

fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 11101, 49 U.S.C. § 11101, provides:

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment, and facilities.

(b) The Commission may prescribe requirements for continuous and adequate transportation and service provided by motor common carriers and freight forwarders subject to the jurisdiction of the Commission under subchapters II and IV of chapter 105 of this title and for transportation of baggage and express by such motor common carriers of passengers.

(c) The Commission may not regulate the duration of, or the amount of compensation payable under, an arrangement between a motor carrier and another party to use, with a driver, a motor vehicle not owned by that carrier to transport property when—

(1) the motor vehicle—

(A) to be used is that of a farmer or a cooperative association or a federation of cooperative associations under section 10526(a)(4) or (5) of this title or a motor private carrier;

(B) is used regularly in the transportation of (i) property referred to in section 10526(a)(6) of this title, or (ii) perishable products manufactured from perishable property referred to in that section; and

(C) is to be used by the carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area where the motor vehicle is based; or

(2) the motor vehicle to be used has completed a movement exempt under section 10526(a)(6) of this title and is next to be used by that carrier in a loaded movement in any direction or in a movement referred to in clause (1)(C) of this subsection, or both.

Section 6(1), 49 U.S.C. § 6(1), *now* 49 U.S.C. § 10762, provided:

Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its route and between points on its own route and points on the route of any other carrier by railroad, by pipeline, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

Section 10762, 49 U.S.C. § 10762, provides:

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly—

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jursidiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter shall identify the carriers that are parties to it. The carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c)(1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate,

the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. A proposed change and a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section.

(d)(1) The Commission may reduce the 30-day period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public interest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept open for public inspection. However, the Commission shall require that all rates of rail carriers and rail rate-making associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomes effective, whichever is later. The Commission may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incorporated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

(f) The Commission may grant relief from this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1833

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS COMMONWEALTH EDISON COMPANY, *ET AL.* IN OPPOSITION

CHARLES J. McCARTHY
BELNAP, McCARTHY, SPENCER, SWEENEY & HARKAWAY
1750 Pennsylvania Avenue, N.W.
WASHINGTON, D.C. 20006

DONALD MACLEAY
JAMES F. BROMLEY
MACLEAY, LYNCH, BERNHARD, GREGG & ATTRIDGE
1625 K Street, N.W.
Washington, D.C. 20006

LEONARD M. TROSTEN
HARRY H. VOIGT
MICHAEL F. McBRIDE
LeBOEUF, LAMB, LEIBY & MacRAE
1333 NEW HAMPSHIRE AVE., N.W.
WASHINGTON, D.C. 20036

JOHN GUANDOLO
MacDONALD & McINERNY
1000 16th Street, N.W.
Washington, D.C. 20036

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS COMMONWEALTH EDISON COMPANY, *ET AL.* IN OPPOSITION

Respondents Commonwealth Edison Company, *et al.*,[1] a group of electric utilities that operate nuclear generating plants and companies engaged in supplying goods and services for such nuclear plants, oppose the request of the principal Eastern railroads that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court below is reported at 611 F.2d 1162.

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[1] The names of Respondents are set forth in Appendix A to this Brief.

QUESTION PRESENTED

When transportation of a commodity by rail has been requested, the Interstate Commerce Commission has found that the request is reasonable, and the Eastern railroads have not challenged that finding, may they nevertheless refuse to transport that commodity on the ground that they have not "held themselves out" as common carriers of that commodity?

STATUTES INVOLVED

Involved provisions of the Interstate Commerce Act and the prior version of those provisions appear in Appendix F to the Petition. The text of 49 U.S.C. §10101, a relevant statute not referred to by Petitioners, is set forth in Appendix B to this Brief.

STATEMENT OF THE CASE

Most of the nation's railroads recognize their common carrier obligation to transport irradiated nuclear fuel (spent fuel) and radioactive waste. They transport such materials under published tariffs subject to the jurisdiction of the Interstate Commerce Commission. Only the Eastern railroads have refused to do so. This case arises out of that refusal.

The Eastern railroads contend that they have an unqualified right to refuse to handle these materials and that, if they elect to handle them as a matter of grace, they may do so at such rates and under such terms and conditions as they see fit. They do not contend that the asserted right to refuse stems from the nature of the materials. Their position is that they have an unqualified right to refuse to handle *any* commodity that they have not previously transported under a published tariff.

When items establishing ratings for spent fuel and radioactive waste were published in the Uniform Freight Classifica-

tion,[2] the Eastern Railroads "flagged out" from those items.[3] Those items thus became applicable only to movements over the Southern and Western Railroads. The Energy Research and Development Administration and these Respondents filed complaints with the Commission asserting that Petitioners' flagout violated various provisions of the Act, including §1(4), which requires common carriers to furnish transportation upon reasonable request therefor, and §6(1), which requires that all rates be included in filed tariffs.[4] The complaints requested that Petitioners be ordered to file tariffs for transportation of such commodities.

Radioactive materials include spent fuel and radioactive waste.[5] While the railroads' refusal included radioactive waste, the hearing focused on the reasonableness of their refusal to transport spent fuel. Petitioners made no effort to justify their refusal to transport radioactive waste.

Efficient and reliable transportation is essential if nuclear energy is to be feasible. The operation of a nuclear reactor is intimately tied to each stage in the nuclear fuel cycle. If the key elements of the cycle are broken, the reactor cannot function. Transportation is the link that ties the stages of the fuel cycle together. J. App. Ex. 7; J. App. Ex. 220-21.

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[2] The Uniform Freight Classification provides ratings for all articles of commerce except a very few commodities included in Rule 3, the so-called "prohibited list", which is comprised of commodities not suited for rail transportation. Radioactive materials are not on the prohibited list.

[3] The flagout is a note stating that the ratings will not apply to traffic moving to, or routed via, the lines of Petitioners.

[4] Now 49 U.S.C. §§11101 and 10762, respectively.

[5] Radioactive waste may be either high level or low level. The former consists of waste derived from spent fuel and must be handled under the same stringent conditions. The latter consists of miscellaneous items such as overalls and tools which have received some incidental contamination. They require a lesser degree of protection and can be shipped in steel drums or fiberboard boxes. Pet. App. 4d.

Spent fuel must be removed from a reactor on a regular cycle. It is stored temporarily at the reactor site but, because storage facilities at nuclear stations are limited, it must be transported from the reactor site to either storage or reprocessing facilities.

In adopting the Atomic Energy Act, Congress made a decision in favor of nuclear energy.[6] Congress recognized that transportation of radioactive materials would be essential and it vested in the Nuclear Regulatory Commission ("NRC") and the Department of Transportation ("DOT") responsibility for establishing regulations which would insure the maximum feasible degree of safety. 42 U.S.C. §§2073, 2201; 49 U.S.C. §1804. Under a Memorandum of Understanding between NRC and DOT, NRC establishes packaging standards which are then adopted by DOT, and DOT develops regulations for safe transport which are then imposed on licensees through NRC regulations. 38 Fed. Reg. 8466 (April 2, 1973).

Spent fuel can be shipped only in casks that comply with very stringent regulations. The philosophy followed by NRC in developing packaging standards was to make certain that "transportation in packages meeting these standards assure safety in transportation by all means of transport, including regular rail service." J. App. Ex. 702. In the view of the Chief of the Transportation and Products Standards Branch of NRC, the standards ensure that:

> The risk in transportation of spent fuel and radioactive waste by truck or rail, including regular train service, approach as close as reasonably possible to zero, that they reach a point where there is no economic or safety basis for further reduction.

J. App. Ex. 705.

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[6] *See* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 557-58 (1978).

Transportation of spent fuel is in casks licensed by NRC and subject to transportation regulations prescribed by DOT. Each spent fuel cask is attached to its own railroad car. "Cask cars" consisting of the car and the attached cask are supplied by the shipper. They are designed for transportation in regular rail service and are within the size and weight limits prescribed by the railroads for general use.

There is no satisfactory alternative to rail transportation. Legal weight truck containers hold no more than 0.5 metric tons of spent fuel, whereas a rail container can hold up to 5 tons. To ship the same quantity of spent fuel requires from 7 to 10 more shipments by truck than by rail. Use of truck transportation thus multiplies the transportation risk and creates serious problems both at the reactor site and at the storage or reprocessing facility. Pet. App. 10b. 8d-9d.

The Eastern railroads have not questioned the need for rail transportation of spent fuel, but they are unwilling to assume any obligation to provide such transportation. The alternative they suggest is that the shipper attempt to enter into a separate contract for each shipment with each railroad over whose lines a shipment must move. Each individual railroad would reserve the right to refuse to enter into such a contract. Moreover, the type of contract offered in the past was cancellable at the will of the railroad and permitted the railroad to refuse to move a shipment either with or without cause even while the contract was in effect. The Commission found that the Eastern railroads' insistence on such private contracts is "tantamount to an embargo". Pet. App. 19d.

In the Initial Decision, the Administrative Law Judge held that the Eastern railroads were subject to the Act's provisions with respect to their transportation of the commodities at issue and ordered them to cancel their flagouts and publish tariffs covering the transportation of such commodities. Pet. App. 17d-18d, 21d. The rationale was that the Eastern railroads "are not free to pick and choose which commodities they will carry in common carrier service and which commodities they will

transport as private carriers", that they are obliged to furnish transportation to all shippers "upon reasonable request", and that Respondents' request for transportation was reasonable. Pet. App. 17d-19d.

On appeal, Division 2 of the Commission affirmed the Initial Decision, adopting its conclusions and findings with only minor changes. Pet. App. 3c. The entire Commission denied review of Division 2's decision on November 22, 1978.

The Court of Appeals affirmed Division 2's decision. Pet. App. B. The Court held:

> The railroads' common-carrier duties in the carriage of nuclear materials must be seen to flow from their role in effecting the National Transportation Policy. These duties are not dependent upon railroads' characterization of themselves as "private" carriers in contracts of carriage, nor upon their supposedly conscious refusal to "hold themselves out" for carriage of nuclear materials. This "holding out" may have indeed been one of the earmarks of common carriers at common law; but in the almost one hundred years since the passage of the Act there has developed a new "common" law of transportation under which the public duty of railroads has been broadened beyond that extant under the common law of carriers. It is not only "common carriage", but transportation which is subject to the Act and to the Commission's statutory powers.

Pet. App. 10b-11b.

REASONS FOR DENYING THE WRIT

Petitioners appear to contend that they are presenting the Court with "an important question of federal law which has not been, but should be, settled by this Court". Sup. Ct. R. 17. The question presented has already been decided by this Court in

cases which the Petition does not cite. In any event, the answer to the question is so clear that it cannot possibly be considered "important".

The Commission has found that Respondents' request for transportation of the involved materials is reasonable. Petitioners do not assert that that finding is not supported by substantial evidence, is arbitrary or capricious, or lacks a rational basis. They stand on the ground that they can refuse a request for transportation, which the Commission has found to be reasonable, if they have not previously "held themselves out" to transport the commodity. That contention is contrary to the plain wording of the statute, is foreclosed by decisions of this Court, and cannot be reconciled with the National Transportation Policy.

1. Whether one looks at the old sections of the Act or at the Act as codified, the statutory duty of the railroads to transport commodities upon reasonable request is so clear that the existence of such a duty cannot possibly present a question of sufficient importance to warrant the granting of a writ of certiorari.

Section 1(1) of the Interstate Commerce Act makes the provisions of that chapter applicable to "common carriers" engaged in the transportation of property by railroad in interstate commerce. Petitioners concede that they come within this definition.

Section 1(4) makes it "the duty of every commmon carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor", and §6(1) requires "every common carrier subject to the provisions of this chapter" to file "schedules showing all the rates, fares and charges for transportation . . . ."

The statute could scarcely be clearer. It requires common carrier railroads to furnish transportation under published tariffs *whenever* they are presented with a reasonable request for such transportation. The clarity of the Act is not obscured by the transparent effort in the Petition to rewrite §1(4), as applying "insofar as a railroad is acting as a common carrier"

(Pet. at 5), and to rewrite §6(1) as requiring publication of rates "for transportation undertaken by them as 'common carriers subject to the Act'." Pet. at 6.

The codification of §1(1) in 49 U.S.C. §10501 takes away even this specious argument. It omits the reference to "common carriers" and defines Commission jurisdiction as covering "transportation. . . by rail carrier". It is true, as Petitioners point out, that the codification was not intended by Congress to work substantive changes in the law. Pet. at 5 n.8. Congress did, however, intend to *clarify* the old law and it specifically clarified the jurisdictional grant of §1(1):

> The words "the Interstate Commerce Commission has jurisdiction" are substituted for "The provisions of this chapter shall apply to" in 49:1(1) and (2) to eliminate surplus language and for clarity because the intent of the words is to grant the Commission jurisdiction. The words "over transportation" are substituted for the words "to common carriers engaged in" . . . to eliminate redundancy and for consistency with the other general jurisdictional statements at the beginning of each of the subchapters of chapter 105 of the revised title, giving the Commission jurisdiction over transportation.

H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 51, *reproduced in* 1978 U.S. Code Cong. & Admin. News at 3060.

The Sixth Circuit correctly relied on that clarification in affirming the Commission's decision. Pet. App. 5b.

2. The precise question here involved was decided by this Court in *Kansas City Southern Ry. v. United States*, 282 U.S. 760 (1931). The issue there was whether railroads could carry private cars of other carriers free or at other than published rates. The railroads had always viewed the transportation of such cars as private carriage, and had never held themselves out

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[7] This is made clear in the opinion in the companion case of Louisville & Nashville R.R. v. United States, 282 U.S. 740 (1931).

to transport such cars as common carriers.[7] The railroads made the same argument that is advanced in the Petition. In rejecting that argument, this Court said:

> Upon the merits, the appellants present the argument that a railway company, in the transportation or movement of an office car of another carrier, acts in the capacity of a private carrier, or bailee, and retains full freedom of contract in relation to such transportation. There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the act. But a common carrier dealing with transportation that is subject to the act cannot escape its statutory obligations by calling itself a private carrier as to such transportation.

282 U.S. at 764 (citations omitted).

The same view was earlier expressed by this Court in *Director General of Railroads v. Viscose Co.*, 254 U.S. 498 (1921). In holding that the Commission had primary jurisdiction to pass on the reasonableness of an attempted cancellation of the classification of artificial silk,[8] the Court relied on *Lake and Rail Butter and Egg Rates*, 29 I.C.C. 45 (1914), where the railroads, which owned the lake lines, had argued unsuccessfully that they could not be required to transport butter and eggs over rail-lake routes because they had refused to do so in the past. The Court noted:

> The contention of the carriers, faintly made, that the common law and not the Interstate Commerce Act furnished the measure of their obligation to the public was promptly overruled by the Commission, informed, as it was, by wide experience in traffic affairs and in the administration of the act.

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[8] The railroads sought to cancel the applicable classification item and to amend Rule 3 of the National Freight Classification by adding artificial silk to the prohibited list.

254 U.S. at 504.

This is not to suggest that a railroad must transport every commodity tendered to it for transportation without reference to whether the commodity is adapted to railroad transportation. A railroad need transport the commodity only if the request for transportation is reasonable. But, as this Court held in *Director General of Railroads*, the reasonableness of the request is a matter within the primary jurisdiction of the Commission.

In exercising its jurisdiction, the Commission has relieved the railroads of their common carrier responsibility in appropriate cases, on the ground that the request was not reasonable. Thus, in *Emporium v. New York Central R.R.*, 214 I.C.C. 153 (1936), the Commission sustained the lawfulness of a provision in Rule 3 which listed silver and gold articles as prohibited on the ground that other services, such as parcel post and express companies, are better equipped than defendants to transport such articles and that "freight service does not afford the supervision necessary to the protection of the considered commodities." 214 I.C.C. at 154. And in *Livestock, South, Southwest, Central and Western Territories*, 346 I.C.C. 418 (1974), the Commission approved the cancellation by certain carriers of rates on livestock on the ground that there was no demand for the service and the carriers did not have the facilities necessary to provide the service. In both cases, the Commission's decision was based on a finding that the request for service was not reasonable because the commodities were better suited to transportation by other modes—not, as stated in the Petition (Pet. at 5), on the ground that the railroad was not offering or engaged in the particular type of transportation as a common carrier.

In this case, the Commission considered the same issue as in *Emporium* and *Livestock*, *i.e.*, whether the request for transportation was reasonable, and found that the record established the reasonableness of the request. That finding has not been challenged.

3. As the Sixth Circuit noted, Petitioners have a "long history of the . . . carriage of nuclear materials." Pet. App. 9b. Even at common law, such carriage was common carriage, regardless of any contractual provisions to the contrary. *Railroad Co. v. Lockwood*, 84 U.S. 357, 376-77 (1873). Petitioners' reliance on this case is misplaced. The language cited at page 4 n.5 of the Petition is dictum. The holding was that the railroad had a common carrier obligation and could not limit that obligation by contract.

4. The objective of the National Transportation Policy is

> To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States . . . .

49 U.S.C. §10101(a). To that end it requires the Commission

> (1) to recognize and preserve the inherent advantage of each mode of transportation; [and]
>
> (2) to promote safe, adequate, economical, and efficient transportation . . . .

As this Court has frequently affirmed, the National Transportation Policy is "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957). *See also Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194 (1944); *Interstate Commerce Commission v. Mechling*, 330 U.S. 567 (1947); *Dixie Carriers, Inc. v. United States*, 351 U.S. 56 (1956); and *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81 (1961).

The Court of Appeals correctly found that the Commission has acted to carry out the National Transportation Policy, as 49 U.S.C. §10101(b) directs it to do. The Court of Appeals stated:

> No other mode of transportation is more suited to the economical carriage of these materials [spent fuel and radioactive wastes] than train carriage, according to the findings of the Commission. . . .

> The Commission has found that truck shipment of nuclear wastes would, because of the greater number of smaller shipments required, increase the probability of accidents involving nuclear materials, and, even if no mishap occurs, result in greater exposure to radiation of transportation workers and the general populace. If the Congressional delegation to the Commission of power to implement the National Transportation Policy is to be effective, the Commission must have the statutory authority exercised by its order. . . .

Pet. App. 10b.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEONARD M. TROSTEN
HARRY H. VOIGT
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Attorneys for

Commonwealth Edison Company
Exxon Nuclear Company, Inc.
Houston Lighting and Power Company
Kansas City Power and Light Company
Kansas Gas and Electric Company
Niagara Mohawk Power Corporation
Northern States Power Company

Pacific Gas and Electric Company
Philadelphia Electric Company
Power Authority of the State of New York
Public Service Company of Indiana, Inc.
Rochester Gas and Electric Corporation
Southern California Edison Company
Union Electric Company
Vermont Yankee Nuclear Power Corporation

CHARLES J. MCCARTHY
BELNAP, MCCARTHY, SPENCER, SWEENEY & HARKAWAY
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorney for

GPU Service Corporation
Pennsylvania Power & Light Company
Virginia Electric and Power Company

DONALD MACLEAY
JAMES F. BROMLEY
MACLEAY, LYNCH, BERNHARD, GREGG & ATTRIDGE
1625 K Street, N.W.
Washington, D.C. 20006

Attorneys for

General Electric Company

Appendix A

Commonwealth Edison Company

Exxon Nuclear Company, Inc.

Houston Lighting and Power Company

Kansas City Power and Light Company

Kansas Gas and Electric Company

Niagara Mohawk Power Corporation

Northern States Power Company

Pacific Gas and Electric Company

Philadelphia Electric Company

Power Authority of the State of New York

Public Service Company of Indiana, Inc.

Rochester Gas and Electric Corporation

Southern California Edison Company

Union Electric Company

Vermont Yankee Nuclear Power Corporation

GPU Service Corporation

Pennsylvania Power & Light Company

Virginia Electric and Power Company

General Electric Company

NL Industries, Inc.

Appendix B

49 U.S.C. §10101. *Transportation Policy.*

(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

Supreme Court, U. S.
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No. 79-1833

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE AKRON, CANTON & YOUNGSTOWN RAILROAD CO., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

JOSEPH H. DETTMAR
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

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QUESTION PRESENTED

Whether the Interstate Commerce Commission and the court of appeals correctly concluded that the Interstate Commerce Act requires petitioners, the major Eastern railroads, to publish tariffs for the transportation of radioactive wastes and spent nuclear fuel, in view of the fact that petitioners for more than 20 years have carried these materials for governmental and private shippers.

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*The other petitioners are: The Baltimore and Ohio Railroad Company; Bangor and Aroostook Railroad Company; Bessemer and Lake Erie Railroad Company; Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees; Central Vermont Railway, Inc.; The Chesapeake and Ohio Railway Company; Consolidated Rail Corporation; Delaware and Hudson

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Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit, Toledo and Ironton Railroad Company; Grand Trunk Railway System; The Long Island Railroad Company; Maine Central Railroad Company; Norfolk and Western Railway Company; The Pittsburgh and Lake Erie Railroad Company; Richmond, Fredericksburg and Potomac Railroad Company; and Western Maryland Railway Company.

Additional respondents are: Commonwealth Edison Company; Houston Lighting & Power Company; Kansas City Power and Light Company; Kansas Gas and Electric Company; Niagara Mohawk Power Corporation; Northern States Power Company; Pacific Gas and Electric Company; Pennsylvania Power & Light Company; Philadelphia Electric Company; Public Service Company of Indiana, Inc.; Rochester Gas and Electric Corporation; Southern California Edison Company; Union Electric Company; Vermont Yankee Nuclear Power Corporation; Virginia Electric & Power Company; and GPU Service Corporation-Holding Company for Jersey Central Power & Light Company, Metropolitan Edison Company; Pennsylvania Electric Company; Energy Research and Development Administration (now the Department of Energy); and the Power Authority of the State of New York.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-15b) is reported at 611 F. 2d 1162. The opinion of the Interstate Commerce Commission (Pet. App. 1c-3c) is reported at 359 I.C.C. 639. The initial decision of the administrative law judge (Pet. App. 1d-21d) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1e) was entered on December 20, 1979. On March 3, 1980, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including May 19, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

For more than 20 years, all of the nation's major railroads have transported spent nuclear fuel and radioactive wastes for government agencies and private parties (Pet. 8 n.18; Pet. App. 8d). The railroads have transported those materials for government agencies under Section 22 of the Interstate Commerce Act, now codified at 49 U.S.C. (Supp. II 1978) 10721,[1] which allows a carrier to charge the government special rates that are exempt from regulation by the Interstate Commerce Commission (Pet. App. 8d). The transportation for private parties has been offered or performed by petitioners, the Eastern railroads, under private contracts. Petitioners have not filed tariffs for that transportation under Section 6(1) of the Act, 49 U.S.C. (Supp. II 1978) 10762 (Pet. 8 n.18; Pet. App. 9d).

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[1]In 1978, the Interstate Commerce Act was revised, recodified and reenacted without substantive change as Subtitle IV of Title 49 of the United States Code, Pub. L. No. 95-473, 92 Stat. 1337, 49 U.S.C. Supp. II 1978) 10101 *et seq.*

Since 1962, the Uniform Freight Classification Committee, a classification bureau representing all of the nation's railroads, has filed with the Commission tariffs that have effectively established "class rates" covering the transportation of spent nuclear fuels and radioactive wastes (Pet. 7).[2] The Southern and Western Railroads have transported such materials for private shippers under these tariffs since 1962. Petitioners, however, have consistently "flagged out" or refused to participate in the tariffs. Instead, petitioners have continued to require private shippers in their service territories to make "special arrangements" with respect to each and every shipment of spent nuclear fuel or radioactive wastes. Recently, these arrangements have required, *inter alia*, that the shippers accept a costly special train service. In administrative proceedings at which petitioners and the nation's other major railroads participated, the Commission found that safety considerations did not require that service (Pet. App. 11b-12b).[3]

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[2]The Uniform Freight Classification Committee publishes tariffs that provide "classification ratings" for all commodities. Other rate bureaus, which represent railroads in discrete geographical territories, file tariffs establishing "class rates" for each class in the Uniform Freight Classification. The geographical rate bureaus and individual carriers may also establish "commodity rates" for special commodities. Those rates are generally lower than the class rates that would otherwise apply to the commodities. If a commodity rate has not been established, the class rate applies.

In this case, petitioners' refusal to join the inclusion of nuclear waste materials in the Uniform Freight Classification has resulted in their having on file no tariff, for either a class or commodity rate, covering the transportation of these materials.

[3]*Radioactive Materials, Missouri-K.-T. R.R.*, 357 I.C.C. 458 (1977); *Radioactive Materials, Special Train Service, Nationwide*, 359 I.C.C. 70 (1978).

In 1976, the Energy Research and Development Administration (now the Department of Energy) and a number of private Eastern utilities filed complaints with the Commission contending that petitioners' "flag outs" were unlawful, and asking that the Commission order petitioners to file tariffs covering the transportation of spent nuclear fuels and radioactive wastes (Pet. 9). Based on the fact that they had never filed tariffs covering this transportation, petitioners asserted that they were private carriers—rather than common carriers—as to these materials, and thus were not subject to the Commission's jurisdiction (*ibid.*).

An administrative law judge rejected petitioners' contentions (Pet. App. 1d-21d), and the Commission adopted the law judge's determination (Pet. App. 1c-3c). The Commission found that petitioners had a common carrier and statutory obligation to transport the materials. Consequently, the Commission ordered petitioners to cancel their "flag outs" and file reasonable and otherwise lawful tariffs covering the transportation. The Commission also found that petitioners' special train requirements could not be justified on safety grounds. The Department of Transportation and the Nuclear Regulatory Commission, the two agencies with expertise and responsibility in this area, had established applicable safety requirements that did not include special train service, and the Commission had independently concluded that such service was not required (Pet. App. 3c).[4]

The court of appeals affirmed (Pet. App. 1b-15b). The court specifically rejected petitioners' contention that they were not common carriers as to these materials, and thus not subject to the Commission's jurisdiction, simply

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[4]See note 3, *supra*.

because they had never filed a tariff covering them (Pet. App. 6b-11b). The court acknowledged that a railroad may be a common carrier as to some commodities and yet be regarded as a private carrier as to others when, "*as a matter of accommodation or special engagement*, [the carrier] undertakes to carry something which it is not [its] business to carry" (Pet. App. 9b (emphasis by the court), quoting from *Railroad Co.* v. *Lockwood*, 84 U.S. (17 Wall.) 357, 377 (1873)). Relying on this Court's decision in *Kansas City So. Ry.* v. *United States*, 282 U.S. 760, 764 (1931), however, the court of appeals rejected petitioners' assertion that a carrier may escape its common carrier and statutory obligations merely by calling itself a private carrier (Pet. App. 6b-7b). Based on the particular facts of this case, the court concluded that petitioners had common carrier obligations by virtue of both "the long history of [their] carriage of nuclear materials" (Pet. App. 9b) and the policies and requirements of the Interstate Commerce Act, which impose obligations on railroads that are not limited to those under the pre-existing common law (Pet. App. 9b-11b).[5]

ARGUMENT

This case presents no conflict among the circuits or any issue of general importance warranting this Court's review. The court of appeals correctly held that the Commission did not exceed its authority in ordering petitioners to cancel their "flag outs" from the Uniform

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[5]In the court of appeals, petitioners made several other arguments that were properly rejected and are not renewed here. For instance, the court of appeals found no merit to petitioners' suggestion that the Commission's order requiring them to publish tariffs improperly required them to provide additional service or facilities (Pet. App. 3b-6b). The court was also correct in rejecting petitioners' contention that the Commission had given inadequate consideration to safety factors (Pet. App. 11b-15b).

Freight Classification and to publish tariffs at the class rate level for the carriage of spent nuclear fuel and radioactive wastes.

1. Petitioners' principal contention (Pet. 12-18) is that the Commission and the court of appeals erroneously held that a railroad that is a common carrier as to some commodities is therefore deemed a common carrier as to other commodities. Petitioners' claim lacks merit because both the Commission and the court of appeals clearly acknowledged that a railroad that is a common carrier as to some or even most commodities may not be a common carrier, and thus not subject to the Commission's rate jurisdiction, as to other special or unique commodities that are "not [the carrier's] business to carry" (Pet. App. 9b, quoting *Railroad Co.* v. *Lockwood*, 84 U.S. (17 Wall.) 357, 377 (1873)). The conclusions of the Commission and the court of appeals in this case rest not on petitioners' carriage of other commodities, but on petitioners' "long history" (Pet. App. 9b) of providing carriage to the complaining parties for the very materials at issue.

2. Petitioners also contend (Pet. 18-25) that the court of appeals erred in holding that petitioners are in fact common carriers as to nuclear waste materials within the meaning of the Interstate Commerce Act. That contention is both fact-bound and incorrect.

a. The court of appeals' conclusion that petitioners are common carriers as to nuclear waste materials is correct even under traditional common law standards.

Petitioners cannot and do not dispute the fact that they have carried these materials for private shippers for many years. Neither do they contend that they have refused to carry these materials for shippers wishing their service or that they now wish to discontinue providing this service.

To support their assertion that they are not "common carriers" subject to the provisions of the Act (*e.g.*, the prohibitions against discrimination, unreasonable rates, and undue preferences) and the Commission's rate jurisdiction, petitioners rely only on the fact that they have never filed a tariff for those services. In effect, petitioners argue that they are not common carriers, despite their actual conduct, merely because they have not chosen to call themselves common carriers with respect to the carriage of these materials.

Petitioners have cited no cases, however, under either the common law or the Act, to support their contention that carriers may avoid common carrier obligations simply by failing to file tariffs or by calling themselves private carriers. Indeed, as the court of appeals noted (Pet. App. 6b-7b), this Court expressly rejected such a contention in *Kansas City So. Ry.* v. *United States*, 282 U.S. 760, 764 (1931), stating that "a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation." See also *United States* v. *ICC*, 288 F. 649, 654 (D.C. Cir. 1923), aff'd, 265 U.S. 292 (1924) (the failure to file a tariff with the Commission does not establish that a railroad is not a common carrier).[6] Accord, *Railroad Co.* v. *Lockwood*, *supra*; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U.S. 397 (1889).[7]

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[6]This principle is consistent with common law decisions imputing common carrier status to carriers that price their services through individual contracts rather than tariff publications. See, *e.g.*, *Jackson Architectural Iron Works* v. *Hurlbut*, 15 Misc. 93, 36 N.Y.S. 808 (N.Y.C. Ct. C.P. 1895); *Weaver* v. *Public Service Commission*, 278 P. 542, 544 (Wyo. Sup. Ct. 1929).

[7]It is obviously not the filing of a tariff that determines whether a railroad is holding itself out as a common carrier. Common carriage obligations existed well before the passage of the Act, which first required the filing of tariffs.

In sum, the obligation of common carriage under both the common law and the Act turns neither upon the carriers' self-description nor upon the formalism of a tariff filing, but upon whether the carrier has in fact offered the transportation services to shippers on a general and continuing basis. The undisputed facts here support the Commission's conclusion, affirmed by the court of appeals, that petitioners have done so.

b. The court of appeals correctly concluded that, in any event, the "common carrier" obligations that the Act imposes on railroads are not rigidly confined to pre-existing common law concepts, but also derive from the purposes of the Act and the National Transportation Policy set forth in the Act. See 49 U.S.C. (Supp. II 1978) 10101.

As noted above (see pages 5-6, *supra*), the court of appeals' determination reflects the traditional common law standards. Moreover, as the court observed (Pet. App. 10b-11b), the enactment, modification and interpretation of the Act has had a significant impact on the definition of the statutory term "common carrier." Although the Act does not define common carriage, the concept did not cease to develop in 1887; the statutory language and the case law interpreting it have necessarily shaped the relevant definition of common carriage. Thus, the court of appeals correctly cited the National Transportation Policy (Pet. App. 10b), enacted by the Transportation Act of 1940, ch. 722, 54 Stat. 898, 899, noting that "[t]he railroads' common-carrier duties in the carriage of nuclear materials must be seen to flow from their role in effecting the National Transportation Policy" (Pet. App. 10b). The court's interpretation does not read the "common carrier" language out of the Act, as petitioners assert (Pet. 22), but merely recognizes that a

substantial body of law has developed since 1887 to shape the scope of "common carriage" by railroad. Petitioners' position, if accepted, would improperly freeze the agency's ability "to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

JOSEPH H. DETTMAR
Attorney
Interstate Commerce Commission

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY OF PETITIONERS

HARRY N. BABCOCK
P.O. Box 6419
Cleveland, Ohio 44101

MICHAEL BOUDIN
STUART C. STOCK
888 Sixteenth St., N.W.
Washington, D.C. 20006
Tel: 202-452-6000
[Counsel of Record]

ANGELICA D. LLOYD
8 N. Jefferson St.
Roanoke, Va. 24042

CHARLES E. MECHEM
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

Attorneys for Petitioners

August 1980

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY OF PETITIONERS

This reply is submitted in response to the oppositions of the Government ("Gov. opp.") and the private utilities ("Utils. opp.").

I.

The Statutory Standard of Common Carriage Is a Recurring Issue Meriting Review by This Court.

For a hundred years federal courts have held or assumed that the common-law test of common carriage—a "holding out" to carry for the public indifferently—was adopted by the

Interstate Commerce Act to define the Commission's jurisdiction over railroads. The Sixth Circuit in this case concluded, however, that the Interstate Commerce Act altered the common-law test and discarded the traditional "holding out" standard. Pet. App. 10b-11b. Following the Sixth Circuit, the Government's opposition asserts in substance that the Act did modify the common-law definition of common carriage. Gov. opp. 7-8.

The Government's position is at odds with both the language of the statute and established precedent. The Government's opposition does not deny that the Interstate Commerce Act utilized the "common carrier" language traditional at common law (see Section 1(1)) without furnishing any different definition or hinting at a change in the standard. Furthermore, this Court has previously applied the common-law holding-out standard[1] and, even more recently, stated that the Act "codified the common law obligations of railroads as common carriers."[2] And the lower courts have repeatedly applied the holding-out standard under analogous provisions of the Federal Communications Act (see Pet. 20, n. 35), while the ICC has applied the holding-out standard in its previous cases under the Interstate Commerce Act. *Id.* at 20, n. 36.[3]

The Government opposition makes little effort beyond mere assertion to support its claim that the common-law holding-out standard has been changed by the Interstate Commerce Act. Yet some defense is clearly necessary in light of the consistent precedent favoring the common-law definition and

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[1] *Washington ex rel. Stimpson Lumber Co.* v. *Kuykendall*, 275 U.S. 207, 211 (1927).

[2] *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 387, 406 (1967).

[3] Accordingly, there is—contrary to the Government's contention—a conflict between the decision below on the one hand and, on the other, prior decisions of this Court, lower federal courts, and the Commission itself which heretofore have followed the common-law standard of common carriage in construing the Act and comparable regulatory statutes. See Pet. 13, 14, 18-21.

the settled proposition that, where Congress uses familiar terms without elaboration—here "common carrier"—it must ordinarily be taken to intend their settled meaning. *E.g., Lorillard* v. *Ponds*, 434 U.S. 575, 583 (1978). The Government merely asserts that "enactment" and subsequent development of the Act has altered the common-law test (Gov. opp. 7), citing the lower court's equally unsupported view of this proposition. The only other support offered are general references to the National Transportation Policy, which has no bearing on the issue,[4] and to this Court's decision in the *American Trucking Ass'ns* case, which is in fact contrary to the Government's assertion.[5]

What is more, the position of the Government and the court below presents a major, recurring issue of statutory construction warranting review by this Court. The legal standard for determining what activities are subject to common-carrier regulation is a jurisdictional demarcation for obligations of railroads, motor carriers, water carriers, communications carriers and other carrier entities regulated under either the Interstate Commerce Act or analogous statutes modelled on it. See Pet. 24. Indeed, the Government's opposition makes no attempt to deny that the statutory standard for determining common carriage under the regulatory statutes is an important and recurring issue of a type that this Court conventionally reviews. Accordingly, plenary review should be granted.

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[4] The National Transportation Policy provides only broad assertions of purpose to guide the Commission in exercising its powers over railroad common carriage. It says nothing whatever about a standard for determining what entities or specific activities are being regulated.

[5] The *American Trucking Ass'ns* case, quoted above, actually supports the view that Congress was following the common law when it "codified the common law obligations of railroads as common carriers." 387 U.S. at 406.

II.

The Government's Attempt to Justify the Lower Court's Decision on a Ground Not Adopted by the Agency or the Lower Court Is Indefensible.

Unable to defend the lower court's contention that the Act changed the common-law standard, the Government's opposition devotes most of its discussion to asserting that the Eastern railroads' carriage of nuclear materials has been conducted on a common-carrier basis in accordance with traditional standards. This blatant effort to support the result on a new foundation, adopted neither by the Commission nor by the Court of Appeals, merely underscores the Government's uneasiness with the Sixth Circuit's holding.

It is undisputed that the common-law standard of common carriage was whether the carrier had "held itself out" as a common carrier (*The Express Cases,* 117 U.S. 1, 21 (1886)) for the particular traffic involved, "undertak[ing] to carry for all people indifferently . . . ."[6] The Eastern railroads have manifestly not held themselves out as common carriers of nuclear materials: they have carried nuclear materials under contracts principally with the Government, contracts that explicitly negated any representation of common carriage; and this service has been furnished pursuant to terms and conditions quite different from those ordinarily involved in common carriage. See Pet. 8. These individualized arrangements, typical of private carriage, are not converted into common carriage by the length of time during which private carriage has been furnished.[7]

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[6] *E.g., American Tel. & Tel. Co.* v. *FCC,* 472 F.2d 17, 24 (2d Cir.), *cert. denied,* 438 U.S. 875 (1978), and other cases cited at Pet. 20, n.35.

[7] The Government's opposition seems to assume that if private carriage is conducted over the course of many years, it magically metamorphoses into common carriage. Gov. opp. 1, 7. There is nothing in the common-law definition, the precedents, or past practice that gives the slightest support to this unspoken but critical assumption. On the contrary, private carriers have operated for decades without any suggestion that they have become common carriers.

The Government's opposition distorts the railroads' position by suggesting that the railroads claim not to be common carriers "simply because they had never filed a tariff" covering nuclear material movements. Gov. opp. 3-4. See also *id.* at 6-7. While the "carriers' self-description [or] . . . the formalism of a tariff filing" (Gov. opp. 7) may not be decisive,[8] the uncontroverted *facts* are that the Eastern railroads have carried such nuclear materials only "as a matter of accommodation or special engagement" (*Railroad Co.* v. *Lockwood,* 84 U.S. (17 Wall.) 357, 377 (1973)) pursuant to specially negotiated contracts with the Government or, occasionally, individual utilities. As this Court has made clear, the test of a carrier's status is "what it does" (*United States* v. *California,* 297 U.S. 175, 181 (1936)), and "what" the Eastern railroads have done is to provide nuclear material carriage without tariffs, only on the basis of special arrangements, and with virtual acknowledgement from the Government that common carriage was not involved.[9]

The Eastern railroads' actions with regard to nuclear materials are so antithetical to the concept of common carriage, as defined and applied at common law, that neither the Commission, nor its ALJ, nor the Sixth Circuit, even suggested that the railroads could be characterized as common carriers of such materials under the common-law standard. Instead, the

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[8] The Government overstates the case, however, in suggesting that omission of tariffs and self-description are irrelevant. The very case it cites but does not quote observed: "With respect to the claim that the Refrigerator Company did not file tariffs with the [ICC], counsel say that this is not proof that it was not a common carrier. No; but it tends to show that the Refrigerator Company did not regard itself as such." *United States* v. *ICC,* 288 F.2d 649, 654 (D.C. Cir. 1923), *aff'd,* 265 U.S. 292 (1924).

[9] The Government's position is especially unseemly in light of the contracts, signed on behalf of "the United States of America" represented by the AEC, explicitly acknowledging that [the railroads] do not hold themselves out to transport such [nuclear] materials. . . ." *E.g.,* J.A. Ex. 583.

holding of the Sixth Circuit is that the common-law standard has been discarded in favor of some new standard which the Government's opposition avows but cannot defend. Under these circumstances, the Government's attempt to rescue the result below, on grounds never adopted below and inconsistent with the known facts, provides no basis for denying certiorari.

III.

None of the Arguments Offered by the Utilities, Which Are Inconsistent With Those Offered by the Government, Provides a Basis for Sustaining the Lower Court's Decision.

The principal argument offered by the utilities opposing certiorari is different from the defense offered by the Government. The utilities contend in substance that the holding-out standard of the common law has been entirely discarded by the Act and that common-carrier status now exists wherever the Commission finds that it is "reasonable" for a carrier to provide common-carrier service. Utils. opp. 8-10. If anything, this drastic assertion underscores the need for review.

The utilities' position finds no support whatever in the statute and would virtually remove any limit to the Commission's jurisdictional reach. It would, indeed, be startling for Congress to make the jurisdictional *outer* boundary of the statute depend on what the agency thought it was reasonable to regulate, and such an argument would raise the most serious constitutional questions of improper delegation of authority. See *Industrial Union Dep't* v. *American Petroleum Institute*, 48 U.S.L.W. 5022, 5032 (U.S., July 2, 1980). In all events, nothing in the statute, its history or past precedent, lends any support for this view.

The statute enacted by Congress provided that its provisions applied to railroads acting as "common carriers" (Section 1(1)) and for almost a hundred years no one has dreamed of

suggesting that provisions of the Act applied to railroads when acting as private carriers. The utilities apparently attribute to Congress a secret intent in 1978, during a routine codification and without any public notice or discussion, to extend the provisions of the Act to *all* railroad transportation and then to carve out *sub silentio* an exception for situations in which the Commission found that it was not "reasonable" to apply common-carrier obligations. Utils. opp. 8. Since Congress explicitly disavowed any intent to change the statute,[10] it is not surprising that neither the Sixth Circuit nor the Government endorses so extraordinary a reading of the statute.

The utilities are equally mistaken in suggesting (Utils. opp. 8-9) that this Court has resolved in their favor the issues presented in this case. *Kansas C. S. Ry.* v. *United States*, 282 U.S. 760 (1931), sustained a determination that railroads—which have long transported railroad passenger cars under tariff—are common carriers of railroad passenger cars and cannot transport passenger cars of other railroads without tariffs.[11] *Director General* v. *Viscose*, 254 U.S. 498 (1921), also cited, concerned an attempt to *de*-tariff silk long carried by the railroads on a common-carrier basis. Neither case in any way supports the decision below involving a class of commodities that the Eastern railroads have *never* transported on a common-carrier basis.

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[10] The utilities' reading is directly inconsistent with Congress' directive in the 1978 codification that the revision "may not" be construed as making substantive changes in the law replaced. 92 Stat. 1468.

[11] The *Kansas City* case would be analogous only if the Eastern railroads had long carried nuclear materials for electric utilities under tariff but declined to file tariffs to transport the same materials for manufacturers. The undisputed fact is that, prior to this case, the Eastern railroads did not carry nuclear materials under tariff for anyone.

Finally, it is claimed that rail transportation of nuclear materials is desirable and safe. Utils. opp. 3-5. The railroads have transported such materials on a private carriage basis for a number of years under contracts providing extensive special precautions for this dangerous commodity; and they have not threatened to discontinue such carriage. So far as the decision below affects the continuance of this transportation, it does so only by making it more difficult for the railroads to maintain those special safety precautions long incorporated in the private contracts but deemed unwarranted by the Commission for tariffed transportation.[12]

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[12] These precautions include the use of special trains dedicated solely to such dangerous nuclear or radioactive material, special routing around yards or specially congested or dangerous areas, low speed limits, and other restrictions. Pet. 8. It is the Commission's position that such precautions are unnecessary (see Gov. opp. 2), and it has asserted common-carrier jurisdiction over the Eastern railroads to implement that determination.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

HARRY N. BABCOCK
P.O. Box 6419
Cleveland, Ohio 44101

MICHAEL BOUDIN
STUART C. STOCK
888 Sixteenth St., N.W.
Washington, D.C. 20006
Tel: 202-452-6000
[Counsel of Record]

ANGELICA D. LLOYD
8 N. Jefferson St.
Roanoke, Va. 24042

CHARLES E. MECHEM
1138 Six Penn Center Plaza
Philadelphia, Pa. 19104

Attorneys for Petitioners

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